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NOTE

TAKING STOCK: THE NEED TO AMEND 28 U.S.C. § 455 TO ACHIEVE CLARITY AND SENSIBILITY IN DISQUALIFICATION RULES FOR JUDGES' FINANCIAL HOLDINGS

*Ziona Hochbaum**

"And yet the fate of all extremes is such, / Men may be read, as well
as books, too much. / To observations which ourselves we make, /
We grow more partial for th' observer's sake."¹

INTRODUCTION

Consider the following scenarios:

Judge *A* owns ten shares in *W* Corporation, which is a named party in a case on her docket. Judge *B* owns ten shares in *X* Corporation, which is a putative member² of the plaintiff class in a class action pending before her. Judge *C* owns ten shares in *Y* Corporation, which is an absent member³ of the certified plaintiff class in a class action pending before her. Judge *D* owns ten shares in *Z* Corporation, making her a putative member of the plaintiff class in a class action she is assigned to hear.

Under the current 28 U.S.C. § 455, the statute governing disqualification and recusal of federal judges,⁴ Judge *A* would have to

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1. Alexander Pope, *Epistle I to Sir Richard Temple, Lord Cobham*, in *Moral Essays* 4 (1751).

2. A putative class member is a potential or expected member of a class where the class has yet to be certified. *See infra* Part II.A.1, 2.

3. An absent class member is any member of a certified class that is not among the class representatives who have filed and are litigating the suit. *See infra* Part II.A.1, 2.

4. 28 U.S.C. § 455 (2000). The term "disqualification" traditionally has been used to refer to the "statutorily or constitutionally mandated removal of a judge," occurring upon the motion of a party. *See* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1214 n.4 (2002). In contrast, "recusal," or "recusation," denotes a judge's "discretionary, voluntary decision to step down." *Id.* In common usage, however, as well as in this

recuse herself regardless of whether her stake in the outcome were one million dollars or one penny.⁵ If, however, Judge *A* had already devoted "substantial judicial time" to the case when the conflict came to her attention, and her interest did not stand to be substantially affected by the outcome, she could divest of her shares and continue presiding.⁶ In addition, some courts would permit Judge *A* to divest of her interest regardless of the stage of the litigation in which it was discovered, provided that she suspended involvement in the case until she had sold the shares, and provided that the interest could not have been substantially affected by the outcome.⁷

Judge *B* would face a more difficult recusal question. Her decision would turn on whether an interest in a putative class member is treated as an interest in a party to the proceeding, an interest in the subject matter of the proceeding, or simply an interest that could be affected by the outcome of the proceeding.⁸ On this question the statute provides no guidance and the courts have reached no consensus.⁹ The consequences of defining her interest one way or another are significant: An interest in a party or in the subject matter of the proceeding would be automatically disqualifying,¹⁰ although the former could be divested under the same circumstances as Judge *A*'s interest.¹¹ On the other hand, an interest that merely stood to be affected by the suit would disqualify Judge *B* only if the potential impact of the outcome were substantial.¹²

Judge *C*, too, would find no answers in the statute or legislative history. Most courts that have considered the question, however, have held that an absent class member has the status of a party to the proceeding.¹³ If Judge *C* adopted this view, she would then follow the same analysis as Judge *A*.

Finally, Judge *D* would have to decide whether her status as a putative class member made her a party to the proceeding, in which case she would have to recuse herself,¹⁴ or gave her one of the other types of interests described above, opening the door to other possibilities.

Note, the terms are generally used interchangeably. *Id.*; see also Margaret Frances Evers, *Disqualification of Federal Judges—The Need for Better Guidelines*, 13 Wake Forest L. Rev. 353, 353 n.1 (1977) (parsing the technical definitions of the terms).

5. See *infra* Part I.C.2 (discussing 28 U.S.C. § 455(b)).

6. See *infra* Part I.C.4 (discussing 28 U.S.C. § 455(f)).

7. See *infra* Part II.A.3.

8. See *infra* Part II.A.2.

9. See *infra* Part II.A.2.

10. See *infra* Part I.C.2 (discussing 28 U.S.C. § 455(b)).

11. See *infra* Part I.C.4 (discussing 28 U.S.C. § 455(f)).

12. See *infra* Part I.C.2 (discussing 28 U.S.C. § 455(b)).

13. See *infra* Part II.A.2.

14. See *infra* Part II.A.2.

Although Congress passed its most recent amendment to 28 U.S.C. § 455 with class actions in mind,¹⁵ the amendment left a ganglia of unresolved questions: Is a class member considered a “party” to the proceeding? What about a putative class member? What happens when the financial interest makes the judge or her family member a class member or putative class member? At what stage of litigation is divestiture permitted to cure the need for the judge’s disqualification? Further, from a theoretical perspective, is there any justification for treating insubstantial financial interests as automatically disqualifying in circumstances not covered by the amendment? These questions arise with greater frequency—and create bigger problems—in the case of class actions, an increasingly popular vehicle for litigation in courtrooms across the nation.¹⁶

All judges must manage funds in one way or another.¹⁷ For many Americans, personal money management includes some sort of investment activity,¹⁸ and members of the federal judiciary are

15. See H.R. Doc. No. 100-889, at 68 (1988). As Congress recognized, determining whether a disqualifying financial interest exists is much more difficult in class action cases.

In complex multidistrict class action cases . . . a full list of all members of a class may not become available until long after litigation has commenced, and a judge will be unable to determine whether a cognizable interest exists until then. When that happens now, the case must be assigned to a different judge, an event which disrupts the efficient administration of the case and can be very costly to litigants.

Id. To address this problem, Congress added a new subsection to the judicial disqualification statute. See 28 U.S.C. § 455(f) (2000). Subsection (f) provides that in cases where an otherwise disqualifying “financial interest in a party” is discovered “after substantial judicial time has been devoted to the matter,” a judge or her spouse or minor child may resolve the conflict by divesting of the interest creating the conflict. See *id.*

16. In 2001, a record 327 federal securities class action suits were filed, marking a sixty percent increase over the previous year. J.H., *Consumers Insist, Despite More Suits, Litigation Curbs Still Harm Investors*, Securities Week, Apr. 15, 2002, at 9. Antitrust cases are also frequently styled as class actions. See 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 18.01 (3d ed. 1992); see also *American Bar Association Section of Antitrust Law: Report to the House of Delegates on Judicial Recusal*, 55 Antitrust L.J. 655, 655 (1986) (noting that the problem of automatic disqualification of judges having only a “de minimis financial interest in the outcome” of a suit arises often in antitrust cases); Diane C. Boniface, Note, *Class Actions: Establishing a More Effective Judicial Disqualification Standard*, 50 Ohio St. L.J. 1291, 1291 (1989) (“The rise in popularity of the class action is one trend resulting from society’s increased interest in litigation.”). For a discussion on the historical rise in the use of class actions, see Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 Tul. J. Int’l & Comp. L. 201, 203-10 (1999).

17. “Virtually every judge must save, shelter, invest, and/or retain funds, whether they were accumulated prior to taking the bench, or simply as a matter of prudent disposition of current income. Short of keeping money under the mattress, every judge engages in some sort of regulated financial activity.” Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* § 7.01 (3d ed. 2000).

18. The ability and ease of online investing has widened avenues for personal

certainly no exception.¹⁹ Nevertheless, when judges are investors, conflicts inevitably arise.²⁰ Although the House Judiciary Committee once asserted that a judge is “free to invest,” provided that he “invest in companies which are not likely to become litigants in his court,”²¹ at least one commentator has pointed out the impracticality of such a guideline in a national (or rather, international) economy.²² Even to the extent that a judge might limit or monitor her own investments to reduce the potential need for disqualification, it is difficult to exercise such control over a spouse, adult child, or other relative’s portfolio.²³ The disqualification rules for financial interests must take these realities into account.

money management. *Business Center* (CNBC television broadcast, Mar. 9, 2001), transcript available at 2001 WL 22670541 (noting a fifty-three percent increase in the number of online accounts in 2000, a jump from eleven million to nineteen million accounts).

19. Though more pervasive today, the problem of disqualification for stock interests is not a new one. See John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 608 (1947) (characterizing disqualification as being “much before the courts and legislatures”); see also Cody W. Smith, Jr., *Judges—Disqualification to Act Because of Stock Interest*, 22 S.C. L. Rev. 261, 262 (1970) (asserting that disqualification is a matter of “current public interest”).

20. Ironically, *In re Cement and Concrete Antitrust Litigation*—one of the seminal cases in this area of jurisprudence and also the decision that prompted Congress to enact subsection (f) of the recusal statute—was, on appeal to the Supreme Court, affirmed for lack of the required six-justice quorum; four justices had to recuse themselves because of the same type of interest held by the challenged judge’s wife. See Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 24.6.3 n.27 (1996); see also H.R. Doc. No. 100-889, at 69 (1988) (discussing *In re Cement* as the impetus for the amendment). Justice Sandra Day O’Connor has had to recuse herself so many times because of investments in corporate parties that she has generated an acronym: OOPS (“O’Connor Owns Party Stock”). See Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide: Should There Be Standards for Recusals?*, Or. St. B. Bull., Nov. 2000, at 12.

21. H.R. Rep. No. 93-1453, at 7 (1974).

22. See Harold S. Levy, *Judicial Recusals*, 2 Pace L. Rev. 35, 41 (1982).

How can a judge anywhere in the federal court system be “free to invest” in the largest corporations of America when those companies are repeatedly present in every circuit, if not district, in the country? Contrary to the committee report’s language, strict application of [28 U.S.C. § 455] means that a judge or his family is definitely not free to invest in any of the so-called “blue chip” securities that are traditionally considered among the best investments. If he cannot invest in his local companies and he cannot invest in national companies, in what can he invest? I suppose real estate on the other side of the country is a possibility.

Id. Judge Susan Getzendanner, declining to recuse after her husband had sold stock in a class member, was slightly more sanguine: “I agree with the congressional admonition that federal judges have an obligation to manage investments with an eye towards minimizing recusal problems, and in this judicial district, which has many national cases and important litigation having nationwide effect, it is not enough to avoid ownership in local companies.” *In re Indus. Gas Antitrust Litig.*, No. 80-C-3479, 1985 WL 2869, at *6 (N.D. Ill. Sept. 24, 1985), *aff’d*, 782 F.2d 710 (7th Cir. 1986).

23. The holdings of family members and relatives to the third degree of relationship can be grounds for disqualification. See 28 U.S.C. § 455(b)(4), (5) (2000).

This Note explores how a judge's stock ownership should affect her ability to preside over any given case. Part I of this Note provides a philosophical and historical overview of judicial disqualification law and summarizes the current statutory scheme. This part also outlines the relevant canons of the Code of Judicial Conduct and how they comport with the statute. Part II explains the special problems class actions raise in the area of judicial disqualification. Next, this part examines the conflicting interpretations of 28 U.S.C. § 455 in cases involving financial interests and class membership, and the possibility of divestiture as a means of curing the need for disqualification. This part demonstrates the need to amend the statute to make it clearer and more adaptable to the nature of these cases, and also examines one promising proposal for reform and why it failed. Part III presents additional reasons for amendment. Next, it looks at how courts have dealt with other types of conflicts, such as racial and religious interests, where disqualification is not automatic. Part III then proposes amendments to 28 U.S.C. § 455, and explains how the new provisions will operate and how they will affect the outcome of the four scenarios that began this Note.

I. JUDICIAL DISQUALIFICATION LAW

The values of fairness and impartiality form the philosophical bedrock of the American judicial system.²⁴ Yet it is both understood and expected that a judge's character and background help to shape her decisions.²⁵ Although these principles have a long legacy, the law of judicial recusal reflects shifting conceptions of what kinds of conflicts are problematic, and how best to balance the quest for perfect justice with the more mundane interest of expediency. This part explores the policy goals underlying judicial disqualification law, and how they sometimes conflict with each other. Next, this part provides a historical overview, tracing the development of increasingly elaborate statutes governing judicial recusal. This part then analyzes the current 28 U.S.C. § 455 as it applies to financial conflicts of interest. Finally, the part discusses the relevant canons of the Code of Judicial Conduct and how those guidelines affect judicial recusal.

A. *The Policy Dialectic*

At stake in judicial disqualification law are two policy goals in

24. See Cathleen M. Devlin, *Disqualification of Federal Judges—Third Circuit Orders District Judge James McGirr Kelly to Disqualify Himself so as to Preserve "The Appearance of Justice" Under 28 U.S.C. § 455*, 38 Vill. L. Rev. 1219, 1219 (1993).

25. See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 237 (1987). Defining an ideal conception of justice is "ultimately impossible but nevertheless essential." *Id.*

tension with each other: an impartial judiciary²⁶ and the efficient administration of justice.²⁷ Disqualification hampers judicial efficiency by delaying the progress of a case and thereby increasing costs.²⁸ The potential for judge-shopping causes particular concern.²⁹ Judge-shopping is a litigation tactic by which a party who believes the assigned judge will be unsympathetic to his or her position—or simply less sympathetic than another judge in the district—moves for recusal even where no objective basis for questioning the judge's impartiality exists.³⁰ A party does not have the right to the judge of his or her choosing; indeed, cases are randomly assigned in every jurisdiction.³¹ Nevertheless, zealous litigators seeking a judge's disqualification can often find some morsel in her background which could form the basis for a recusal motion. When a judge grants such a motion, the case must be assigned to another judge unfamiliar with the litigation. Thus, judge-shopping impairs the efficient administration of justice. To ensure both fairness and efficiency, the law must strike a proper balance: If it too easily allows litigants to get rid of a judge, the cost and delay of justice increase. If it prevents litigants from disqualifying a biased judge, the quality of justice is compromised.³²

26. In fact, the *appearance* of partiality is what is frequently at play in the cases. This is because of the "catch-all" provision of 28 U.S.C. § 455. See 28 U.S.C. § 455(a). "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* This does not represent a watered-down standard, but a stringent one. While actual bias will usually create an appearance problem, an appearance of partiality can exist even in the absence of actual bias. See generally *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-61 (1988).

27. See Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662, 663 (1985); Smith, *supra* note 19, at 271.

28. See *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000) ("In any event, the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice."); *United States v. McLain*, 701 F. Supp. 1544, 1556 (M.D. Fla. 1988) ("A busy district court cannot accept unwarranted recusals or changes in judges' assignment; they place extra burdens on the other judges and waste judicial resources." (internal citation omitted)); Bloom, *supra* note 27 at 664.

29. See, e.g., *United States v. El-Gabrowny*, 844 F. Supp. 955, 958-59 (S.D.N.Y. 1994) ("[R]ecusal motions should not be allowed to be used as 'strategic devices to judge shop.'"). Some commentators believe that judge-shopping is a sort of forum-shopping within the same forum, and thus "fosters the same manipulative evils that led the United States Supreme Court to vigorously condemn forum-shopping." Flamm, *supra* note 20, § 3.5.2 (citing *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965)). But see *In re A.H. Robins Co. Prod. Liab. Litig.*, 602 F. Supp. 243, 245-46 (D. Kan. 1985) (holding that a court should disregard forum-shopping allegation to focus on merits of disqualification motion under the statute).

30. See Flamm, *supra* note 20, § 21.2.

31. See *id.*; see also, e.g., *Sch. Dist. of Kansas City, Mo. v. Missouri*, 438 F. Supp. 830, 831 (W.D. Mo. 1977).

32. See Smith, *supra* note 19, at 271 ("[I]f disqualification of judges is too strict, both the cost and the delay of justice increase because the case is postponed or another judge is brought in to hear it. If disqualification is too liberal and judges with

The concern with judicial impartiality has several bases. First, the Constitution guarantees litigants "due process of law."³³ A biased tribunal clearly contravenes the notion of due process.³⁴ Indeed, procedural protections, including those provided by the rules of evidence, are of little value if the presiding judge is biased.³⁵ In addition, the Supreme Court has held that a biased tribunal may violate due process in certain circumstances, particularly in criminal cases.³⁶ Second, judicial authority rests on public acceptance of courts and judges,³⁷ and such public acceptance rests in turn on a belief in the impartiality and competence of those making judicial decisions.³⁸ When that belief is shaken by revelations of conflicts of interest, the entire judicial system suffers.³⁹

substantial stock interests are allowed to sit, cases may, however, be decided with less delay, but unfairly."); see also Frank, *supra* note 19, at 608 ("[I]f disqualification of judges is too easy, both the cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly, but unfairly.").

33. U.S. const. amend. XIV § 1.

34. See Flamm, *supra* note 20, § 2.3.1; Bassett, *supra* note 4, at 1218; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 746 (1973) [hereinafter *Disqualification of Judges and Justices*].

35. Bassett, *supra* note 4, at 1218-19.

36. See Flamm, *supra* note 20, § 2.3.1 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); Jeremy S. Brumelow, Case Note, *Liteky v. United States: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 Ark. L. Rev. 1059, 1064 (1995); *Disqualification of Judges and Justices*, *supra* note 34, at 746 & nn.34-35.

37. See Devlin, *supra* note 24, at 1219 n.2; Recent Development, *Mitchell v. Sirica: The Appearance of Justice, Recusal, and the Highly Publicized Trial*, 61 Va. L. Rev. 236, 250 (1975) [hereinafter *The Appearance of Justice*] ("The more highly publicized a case becomes, the more important it becomes to maintain the appearance of justice."); *Disqualification of Judges and Justices*, *supra* note 34, at 746-47 (quoting Justice Frankfurter's observation that "courts possess 'neither the purse nor the sword'").

38. *Disqualification of Judges and Justices*, *supra* note 34, at 747.

39. A study by the Community Rights Counsel ("CRC") released in 1999 found that at least eight federal appellate judges had ruled on the merits in at least seventeen federal appeals in which they had a disqualifying financial conflict of interest. See CRC Investigative Research Report: Appellate Judges' Financial Conflicts of Interest, www.communityrights.org/Newsroom/CRCPressReleases/conflictsreport.asp (last visited Feb. 20, 2003) [hereinafter CRC Report]. The study, conducted by examining judges' financial disclosure forms, received considerable media coverage, undoubtedly damaging the perception of judges in the eyes of the American public. See, e.g., Joe Stephens, *Judges Ruled on Firms in Their Portfolios*, Washington Post, Sept. 13, 1999, at A1. The judges asserted that their failure to withdraw from the cases was due to innocent oversights. *Id.* The *Kansas City Star* published a similar study in 1988, finding fifty-seven cases in which a district judge had issued one or more orders despite owning party stock. See *Review of Judicial Misconduct Statutes: Oversight Hearing Before the House Judiciary Subcomm. on Courts, the Internet, and Intellectual Property, on the Operation of Federal Judicial Misconduct and Recusal Statutes*, 107th Cong. (2001) (testimony of Douglas T. Kendall, Exec. Dir. of CRC). The effects of such revelations run deep. "When the image of the judiciary is tarnished, the moral authority of the court is critically

On the other hand, there are good reasons for limiting disqualification of judges. First, as a threshold matter, disqualification is a constitutional issue "only in the most extreme of cases."⁴⁰ Second, overly frequent disqualification might have the paradoxical effect of undermining public confidence in the judiciary by impugning the impartiality of judges in general.⁴¹ Finally, there are the concerns about the cost in resources caused by judicial recusal,⁴² and the potential for abuse by litigants looking to judge-shop or to merely elongate the process in order to frustrate the opposing party.⁴³

B. *Tracing the Statutes*

The early English common law of disqualification had the advantage of simplicity: A direct financial interest disqualified a judge from presiding; bias, or any other type of conflict, merited no concern.⁴⁴ The guiding axiom of the day was Lord Coke's famous admonition, with reference to cases impacting a judge's pocketbook, that "no man shall be a judge in his own case."⁴⁵ Under this approach, a judge might be disqualified because he stood to pocket the fine which he had to impose; or to evict a tenant from a property in which he had an interest; or even, for a time, to gain or lose by the decision as a taxpayer.⁴⁶

undermined." Devlin, *supra* note 24, at 1219 n.2 (quoting John P. MacKenzie). Put in more extreme terms, "[t]he judiciary could not function as a viable institution in a democracy if the public lost faith in the impartiality and integrity of its judges." Bloom, *supra* note 27, at 663-64.

40. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

41. See Bloom, *supra* note 27, at 664.

42. See *supra* note 28 and accompanying text.

43. See *supra* notes 29-32 and accompanying text; see also *Black v. Am. Mut. Ins. Co.*, 503 F. Supp. 172, 173 (E.D. Ky. 1980) (criticizing party for waiting until a few days before trial, when intense settlement negotiations had begun, to raise disqualification issue); *id.* at 174 (noting that even if delay was not the motive for filing the motion, the opposing parties would still unfairly suffer denial of "the reasonably prompt day in court to which they are entitled" were the motion for recusal granted). Some courts have expressed the fear that recusal motions will become yet another standard motion to be filed in every case. See *Sollenbarger v. Mountain States Tel. and Tel. Co.*, 706 F. Supp. 776, 779 (D.N.M. 1989) (citing additional cases).

44. Frank, *supra* note 19, at 609. Indeed, even when a judge was related to a party, early English courts did not require disqualification. Bassett, *supra* note 4, at 1223.

45. Frank, *supra* note 19, at 610. The original Latin phrase is "Aliquis non debet esse iudex in propriis causa." Evers, *supra* note 4, at 356. Blackstone shared the view that only pocketbook-based conflicts warranted disqualification. Bassett, *supra* note 4, at 1223; Evers, *supra* note 4, at 356.

46. Frank, *supra* note 19, at 610. Disqualification of judges as taxpayers created obvious difficulties—if every judge had a disqualifying interest by virtue of being a taxpayer, who would hear the case? *Id.* at 611. Thus evolved the doctrine known as the "rule of necessity," which permits a judge to sit when another conflict-free judge

While American civil law incorporated the bar against presiding with a financial conflict of interest, it greatly, if gradually, expanded the concept of financial interest, thereby broadening the grounds available for disqualifying a judge.⁴⁷ Congress enacted the first disqualification statute in 1792.⁴⁸ The law required recusal "when the judge had a financial interest in the litigation or [had] represented either party as counsel."⁴⁹ An 1821 amendment also required recusal when a judge's relationship to a party rendered it improper, in the judge's own opinion, to preside over the case.⁵⁰

In 1911, Congress significantly broadened the original statute by adding a judge's "interest" in the case, prior role as counsel, status as a material witness, or close relationship with an attorney to the list of disqualifiers.⁵¹ At the same time, Congress passed legislation which for the first time allowed a party to request disqualification when he or she believed the judge had a personal bias or prejudice against him or her.⁵² In 1948, these two statutes were recodified as the current 28 U.S.C. §§ 455 and 144,⁵³ respectively. As part of the recodification of

cannot be had. *Id.*

47. The increasing elaboration in disqualification provisions with each amendment represents a quest for a sort of uber-perfection in the judiciary. See Leubsdorf, *supra* note 25, at 245. According to one commentator, "[i]ncreasing doubts that correct answers exist for legal questions underlie the growth of disqualification." *Id.* at 249.

48. Bassett, *supra* note 4, at 1223 (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79); see also Evers, *supra* note 4, at 357.

49. Bassett, *supra* note 4, at 1223; Evers, *supra* note 4, at 357.

50. Bassett, *supra* note 4, at 1223 (citing Act of Mar. 3, 1821, ch. 51, 3 Stat. 643). A second statute passed in 1891 prohibited appellate judges from hearing appeals from cases they had tried. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826 (codified as amended at 28 U.S.C. § 47 (2000)); see Bassett at 1223-24.

51. Bassett, *supra* note 4, at 1224 (citing Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090).

52. Bassett, *supra* note 4, at 1224 (citing Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090).

53. Bassett, *supra* note 4, at 1225. Section 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144 (2000).

Though broadly worded, the section's reach has been judicially narrowed, by requiring that the source of the bias be from outside the courtroom (the so-called "extrajudicial source doctrine") and that a "sufficient affidavit" set forth extensive facts rather than conclusory allegations. Bloom, *supra* note 27, at 666-68; *The*

§ 455, Congress made two changes. First, it made the provision self-executing by removing the requirement that a party initiate disqualification.⁵⁴ Second, it added the word "substantial" before the word "interest" as a ground for invoking the statute, thus giving judges wide discretion to evaluate their interests in a given case and decide whether recusal was necessary.⁵⁵

The next major changes to § 455 took place in 1974.⁵⁶ A host of scandals and controversies had fueled the movement for change,

Appearance of Justice, *supra* note 37, at 237-49. Thus, it is difficult for litigants to obtain a judge's recusal under § 144. In any event, the provision is limited to challenges for bias and prejudice, and so has "little relevance" to the issue of disqualification for financial conflicts of interest. Evers, *supra* note 4, at 358.

54. Bassett, *supra* note 4, at 1225.

55. *Id.*; Smith, *supra* note 19, at 268. The statute read:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970). Even actual bias was not a bar if it did not fall under one of the three categories specified in the provision. See Flamm, *supra* note 20, § 23.5.2.

56. Bassett, *supra* note 4, at 1225. This "drastic change" made it easier, both procedurally and substantively, for litigants to disqualify a judge. Brumbelow, *supra* note 36, at 1072. The revised statute read:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

including the failure of the Senate to approve Justice Abe Fortas as Chief Justice and the unsuccessful nomination of Judge Clement Haynsworth, Jr. to the Supreme Court.⁵⁷ The 1974 amendment rejected the "substantial interest" standard as too uncertain. Instead, Congress established a per se disqualification rule, enumerating several types of conflicts which automatically disqualify a judge.⁵⁸ Under the new rule, even a de minimis financial interest required

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation; the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455 (1974).

57. Both the Fortas and Haynesworth episodes involved alleged conflicts of interest. See Shawn P. Flaherty, Casenote, *Liteky v. United States: The Entrenchment of an Extrajudicial Source Factor in the Recusal of Federal Judges Under 28 U.S.C. § 455(a)*, 15 N. Ill. U. L. Rev. 411, 411 (1995). Justice Fortas resigned from the Supreme Court in 1969 because of accusations that he had accepted improper extrajudicial compensation. Bloom, *supra* note 27, at 672 n.53. Judge Haynesworth's nomination to replace Justice Fortas failed because of allegations that he had presided over cases in which he had conflicts of interest. *Id.* Other controversies which generated negative publicity were Justice Rehnquist's decision not to recuse himself in *Laird v. Tatum*, 409 U.S. 824 (1972), Bloom, *supra* note 27, at 672 n.53, and Judge Sirica's refusal to withdraw from a Watergate trial, Evers, *supra* note 4, at 354. For a critique of the Rehnquist decision, see Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook. L. Rev. 589 (1987). For a critique of the Sirica decision, see *The Appearance of Justice*, *supra* note 37.

58. See 28 U.S.C. § 455(b) (2000).

disqualification.⁵⁹ Congress also added subsection (a), providing that a judge must disqualify herself whenever her impartiality might reasonably be questioned.⁶⁰

The goal of the changes was to raise public confidence in the judiciary and in the impartial administration of justice⁶¹ and to bring the statute in line with the American Bar Association's Code of Judicial Conduct.⁶² However, the per se rule generated vigorous debate and opposition.⁶³ Critics, including the ABA's Committee on Judicial Conduct, the Judicial Conference of the United States, and several members of Congress, focused their opposition on the absence of a provision allowing the parties to waive the conflict.⁶⁴ A waiver provision would offer a potential solution in cases of de minimis interests. One representative summed up the problem:

The necessary effect of this inflexible provision is that, by legislative enactment, we could have a true Daniel come to judgment—or a Learned Hand upon the bench—and if the case involved, let us say, the Exxon Corporation, and the judge owned 20 shares of common stock, which he had inherited from his parents many years before and had never particularly thought of since, he absolutely could not sit, even though both parties to the cause preferred him—because of his expertise, learning, and integrity—to any and all other available members of the judiciary.⁶⁵

The legislative history, however, reflects an assumption by lawmakers that in such a case a judge could simply divest of a small stock interest

59. *Id.* at § 455(d)(4).

60. *See id.* § 455(a).

61. "With a revised section 455, Congress sought to 'clarify and broaden the grounds for judicial disqualification.'" Brumbelow, *supra* note 36, at 1077, (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)).

62. *See* H.R. Rep. No. 93-1453, at 1-2 (1974). The 1972 version of the Code had already been adopted by the Judicial Conference of the United States. *Id.* at 3; *see also* 119 Cong. Rec. S33,029-30 (daily ed. Oct. 4, 1973) (statement of Sen. Burdick).

63. *See In re Cement Antitrust Litig.*, 688 F.2d 1297, 1311-13 (9th Cir. 1982) (recounting the legislative history of the 1974 amendment to 28 U.S.C. § 455).

64. *Id.* In this respect, the new § 455 differed from the 1972 Code of Judicial Conduct, which contained the following waiver provision:

Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Model Code of Judicial Conduct, Canon 3(D) (1972), *reprinted in* E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 17 (1973).

65. H.R. Rep. No. 93-1453, at 15 (1974) (remarks of Rep. Dennis).

and continue to preside.⁶⁶

The year 1988 marked the most recent amendment to § 455: the addition of subsection (f).⁶⁷ This new provision was intended to address the special problems raised by class action suits,⁶⁸ which had been brought into sharp relief by the case of *In re Cement*.⁶⁹ There, the Ninth Circuit held that a judge who had presided over a multidistrict antitrust class action for over five years had to recuse himself when he learned that his wife owned stock in seven of the more than 210,000 plaintiff class members—giving her a financial stake of barely thirty dollars in the outcome of the suit.⁷⁰ The amendment provided for divestment of an inconsequential financial interest “in a party” discovered at a late stage in the litigation as an

66. The possibility of divestment of inconsequential interests was offered as a justification for adopting the per se rule:

With respect to this change, the issue is very simple: For example, if the financial interest is but a few shares of stock in a corporation, such a small holding is probably but a small part of the judge's investments and *there would be no great loss to him if he should decide to change that investment in order to eliminate any possible grounds of disqualification*. On the other hand, if the number of shares represents a large investment, no one could question that ownership of such shares requires disqualification.

119 Cong. Rec. S33,029-30 (daily ed. Oct. 4, 1973) (comments of Sen. Burdick) (emphasis added); see also *Disqualification of Judges and Justices*, *supra* note 34, at 752 (“[A] strict per se rule will not work a great hardship against a judge, for if the interest is so small that no reasonable man could suspect bias, the judge can easily divest himself of the interest rather than disqualify himself.”). Chief Justice Stone, for example, sold investments a number of times in order to avoid recusing himself. *Disqualification of Judges and Justices*, *supra* note 34, at n.68.

67. See *supra* note 15 and accompanying text. Subsection (f) provides:

Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455(f) (2000).

68. See *supra* note 15 and accompanying text.

69. *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982). See *supra* notes 16, 20.

70. *In re Cement*, 688 F.2d at 1300, 1313. Judge Muecke's wife did not wish to sell the stock. It is possible that this fact—rather than the de minimis interest itself—was the real story behind the Ninth Circuit's holding that the per se rule applied. *In re Indus. Gas Antitrust Litig.*, No. 80-C-3479, 1985 WL 2869, at *2 n.3 (N.D. Ill. Sept. 24, 1985). If the law at the time indeed sanctioned voluntary divestment as a cure, that would mean Congress misread the case and drafted an amendment to address a problem that did not exist.

alternative to the judge's disqualification.⁷¹

C. *Financial Interests Under 28 U.S.C. § 455*

The current 28 U.S.C. § 455⁷² addresses two main categories of situations requiring disqualification: one involving a proscribed relationship with, or interest in, the matter in controversy, and the other involving either actual prejudice concerning a party or the appearance of bias.⁷³ Though most financial interests fall into the first category, an interest may create an appearance of bias even if it is not explicitly proscribed.

1. Subsection (a): Appearance Matters

Subsection (a) of § 455 reads: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."⁷⁴ This subsection is a general, "catch-all" provision⁷⁵ requiring that a judge disqualify himself in any proceeding in which there is an objective risk that he will be perceived as biased.⁷⁶ Under this provision, it does not matter whether the judge is actually biased.⁷⁷ By deferring to an objective

71. See 28 U.S.C. § 455(f). For the full text of subsection (f), see *supra* note 67.

72. For the full text of the statute, see *supra* notes 56, 67.

73. See Charles Malarkey, Note, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 Hastings L.J. 695, 703 n.51 (1990) (citing Prof. Moore). According to Moore, the second type of case differs markedly from the first in that it involves a great deal more discretion on the part of the challenged judge. *Id.*

74. 28 U.S.C. § 455(a) (2000).

75. H.R. Rep. No. 93-1453, at 5 (1974).

76.

[T]o say that § 455(a) requires concern for appearances is not to say that it requires concern for mirages. The standard... is applied "not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge."

United States v. El-Gabrowny, 844 F. Supp. 955, 961 (S.D.N.Y. 1994) (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

By introducing an objective disqualification standard, the 1974 amendment to § 455 had the effect of eliminating the so-called "duty to sit," which had become a gloss on the statute. See H.R. Rep. No. 93-1453, at 5 (1974). The "duty to sit" operated as a presumption in favor of the assigned judge's remaining on the case, unless and until an unambiguous showing of bias was made. See Flamm, *supra* note 20, § 20.10.1. Nevertheless, the notion that judges should avoid recusing themselves unless absolutely necessary—and may not recuse themselves to get out of hearing difficult cases—still carries weight. See *In re Drexel*, 861 F.2d at 1312 ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."); accord *Carter v. West Publ'g Co.*, No. 99-11959, 1999 WL 994997, at *6-7 (11th Cir. Nov. 1, 1999).

77. See *supra* note 26. For a detailed analysis of the application of § 455(a), see Kenneth M. Fall, Note, *Liljeberg v. Health Services Acquisition Corp.: The Supreme*

standard, subsection (a) allows a judge to recuse herself, or an appellate court to order her recusal, without having to actually impugn her impartiality.⁷⁸

The appearance of bias test has been criticized, however, on the grounds that it distracts both judges and policymakers from identifying what is and is not unjust.⁷⁹ If there is a substantive objection to the judge's presiding, that should be reason enough to disqualify her.⁸⁰ If an examination of the facts dispels what at first might seem plausible objections, the judge can remove the appearance problem by explaining why the objections fail.⁸¹ Recusal on the basis of possible speculation alone, the argument goes, serves no bona fide purpose.

Analysis of the possible appearance of partiality under subsection (a) is not limited only to facts or interests not implicated by the analysis under subsection (b),⁸² which enumerates various disqualifying circumstances. Any interest, even one excepted by the language of subsection (b), is subject to the appearance of bias test.⁸³ Therefore, when a judge deems subsection (b) inapplicable, the analysis must shift to subsection (a) to determine whether recusal is nonetheless required.⁸⁴ Disqualification under subsection (a) can,

Court Encourages Disqualification of Federal Judges Under Section 455(a), 1989 Wis. L. Rev. 1033. In *Liljeberg*, 486 U.S. 847, 850 (1988), the Supreme Court held, in a five-to-four decision, that if on appeal it is determined that an objective observer would believe that the judge should have been aware of the conflict of interest, the judge may be retroactively disqualified. The Court further held that a final judgment may be vacated on these grounds. *Id.* Therefore, judges have an incentive to disclose possible grounds for disqualification because they can be reversed later if the interest is found out. See Fall, *supra*, at 1054.

78. See Leubsdorf, *supra* note 25, at 243.

79. *Id.* at 278.

80. *Id.*

81. *Id.* While he ultimately takes issue with the appearance standard, Professor Leubsdorf recognizes its merit in maintaining public confidence in the integrity of the judiciary. "This standard makes it clear to the challenged judge that belief in her own purity will not suffice; she must consider how others will view her conduct." *Id.*; cf. Tenth Circuit Survey, *Professional Responsibility: Comments on Recusal*, 73 Denv. U. L. Rev. 919, 921 (1996) ("There are no close cases. You either are or are not biased." (comment of Judge Kelly)).

82. See *In re Certain Underwriter*, 294 F.3d 297, 305 (2d Cir. 2002).

83. See *Disqualification of Judges and Justices*, *supra* note 34, at 752 n.66. For example, even an interest in a mutual fund, if extraordinarily large, could present grounds for disqualification. *Id.* Another example of this is a case in which the defendant paid a substantial amount of rent which was eventually credited to the judge's spouse as the sole beneficiary of a trust managed by the lessor as trustee. See Financial Interest: Judge's Spouse Beneficiary of a Trust from which Defendant Leases Property, 2 Advisory Op. U.S. Judicial Conference Comm. on Codes of Conduct No. 27 (1998), available at www.uscourts.gov/guide/vol2/27.html.

84. See *In re Certain Underwriter*, 294 F.3d at 305. See generally *Perpich v. Cleveland Cliffs Iron Co.*, 927 F. Supp. 226 (E.D. Mich. 1996); *NEC Corp. v. Intel Corp.*, 654 F. Supp. 1256 (N.D. Cal. 1987), *vacated as moot on other grounds, appeal*

however, be waived by the parties.

The review of a recusal decision under subsection (a) is "extremely fact intensive."⁸⁵ For example, in *Liljeberg v. Health Services Acquisition Corp.*,⁸⁶ the Supreme Court held that a judge who was a trustee of a university which had a financial interest in the litigation was retroactively disqualified under subsection (a), even if, as the judge claimed, he lacked actual knowledge of the university's interest at the time of the trial.⁸⁷ The Court noted, among other striking facts, that the judge had faithfully attended Board of Trustees meetings for years, and negotiations on the project at issue had appeared on the agenda of a meeting attended by the judge only a few days before the lawsuit was filed.⁸⁸ As a general rule, however, courts have cautioned against reading subsection (a) too broadly so as to make it presumptive.⁸⁹

dismissed, 835 F.2d 1546 (9th Cir. 1988). In *NEC*, the district court reasoned:

Congress did not conclude that any interest, no matter how small, in a party raises a question as to a judge's impartiality. . . . NEC's suggested interpretation of section 455(a) would make section 455(b)(4) superfluous; if a judge is disqualified under section 455(a) as of the date an objective observer would conclude that he has knowledge of a financial interest . . . then *a fortiori* he is disqualified whenever he has actual knowledge of an interest.

NEC Corp., 654 F. Supp. at 1259; *see also* Flamm, *supra* note 20, § 24.1.

85. *See* Republic of Panama v. Am. Tobacco Co., 217 F.3d 343, 346 (5th Cir. 2000).

86. 486 U.S. 847 (1988).

87. *Id.* at 850, 858-59. The Supreme Court pointed out that "scienter is not an element of a violation of § 455(a)." *Id.* at 859. The Court took the drastic step of vacating the judgment of the district judge. *Id.* at 870.

88. *Id.* at 865.

89. *See* United States v. Snyder, 235 F.3d 42, 45 (1st Cir. 2000) ("[J]udges are not to recuse themselves lightly under § 455(a)."); United States v. Pappert, No. CRIM.-A.-942001601, 1998 WL 596707, at *7 (D. Kan. July 29, 1998) ("[S]ection 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." (citation and quotation marks omitted)); Idaho v. Freeman, 507 F. Supp. 706, 733 (D. Idaho 1981) ("[A] broad or liberal application of section 455(a) appears to be against the spirit of section 455. For example, if a judge disqualifies himself upon mere application, or mere allegation that his appearance of impartiality might be questioned, it would make the nonperemptive statute in effect peremptive and encourage judge-shopping . . ."). This caution is firmly rooted in the legislative history:

[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification . . . must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R. Rep. No. 93-1453, at 5 (1974); *see also supra* notes 29-32 and accompanying text.

2. Subsection (b): The Per Se Rule

Subsection (b) is both stricter and broader than subsection (a).⁹⁰ For one thing, it allows for almost no discretion on the part of the judge.⁹¹ For another, there is no waiver provision applicable to it.⁹² Subsection (b) provides, in pertinent part, that a judge shall disqualify himself if:

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding . . .

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . .⁹³

Notably, subsection (b) incorporates the proviso that a judge is only disqualified for interests of which he is aware.⁹⁴ This knowledge requirement can make all the difference.⁹⁵

Under the so-called per se rule of subsection (b)(4), a judge is disqualified if she, her spouse, or minor child in her household has a financial interest, however small, in the “subject matter in controversy” or in a party, or any other interest that might be substantially affected by the outcome of the case.⁹⁶ Without the

90. See *Liljeberg*, 486 U.S. at 859-60 n.8; *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988); see also *Reilly v. Hussey*, 989 F.2d 1074, 1076 (9th Cir. 1993) (involving a judge's erroneous acceptance of a waiver of a subsection (b) conflict).

91. The only place where the judge must exercise discretion is in deciding whether or not an interest classified as “any other interest” could be “substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(4) (2000).

92. See 28 U.S.C. § 455(e) (waiver provision applying to subsection (a) cases only). Because conflicts under subsection (b) are unwaivable, the timeliness of a motion for disqualification may be less important when the motion is brought under this provision as opposed to under subsection (a). See *Delesdernier v. Porterie*, 666 F.2d 116, 121-22 n.3 (5th Cir. 1982).

93. 28 U.S.C. § 455(b).

94. See 28 U.S.C. § 455(b)(4), (5)(iii). The judge might know about the interest himself, or a party might bring it to his attention after discovering it through investigation. For a discussion of conflict disclosures, see *infra* Part I.C.3.

95. See *infra* Part I.C.3; see also *Smith*, *supra* note 19, at 265-66 (citing a California case construing a state disqualification statute that contained no knowledge requirement, the absence of which rendered the judge's and parties' ignorance of the judge's conflict immaterial).

96. 28 U.S.C. § 455(b)(4), (d)(4). Subsection (d) also lists exceptions to the per se

benefit of legislative history, courts have struggled to define the phrase "subject matter in controversy."⁹⁷ Courts generally interpret it to mean a financial interest in an entity, other than a party, on which the case will have a direct effect.⁹⁸ In the case of class actions in which a judge or a family member owns stock in an absent or putative class member, courts have strained to define the scope of the term "party," reaching differing conclusions about whether absent or putative class members are akin to parties.⁹⁹ The statute also does not define "any other interest that could be substantially affected by the outcome of the proceeding."¹⁰⁰ Courts have held that the clause refers to substantial indirect interests, whether financial or of some other kind.¹⁰¹ Professor Wright's test assesses this type of "other interest" based on the "interaction of two variables: the remoteness of the interest and its extent or degree."¹⁰² As the possibility and extent of

rule, such as passive investment in a mutual fund. *Id.* § 455(d)(4)(iii). The interest of adult children, or of minor children not living in the household, is considered under subsection (a)'s "residuary appearance of partiality clause." See Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 Neb. L. Rev. 1046, 1070 (1993).

97. See, e.g., *Sollenbarger v. Mountain States Tel. and Tel. Co.*, 706 F. Supp. 776, 780 (D.N.M. 1989) ("Congress provided little explicit guidance on the meaning of this phrase. It is not defined later in the statute. Neither the parties nor the court have found any legislative history on the phrase."). One view is that "subject matter in controversy" is meant to apply to *in rem* proceedings. *Id.*

98. *Id.* at 781. In Native American land claim cases in which a judge owned land near the claim area but outside its perimeters, the court held that while the judge did have a financial interest, the possibility that his property's value might drop was not a direct interest sufficient to disqualify him under this provision. See *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983); *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982), cited in *Sollenbarger*, 706 F. Supp. at 781. Similarly, "subject matter in controversy" does not include ownership of stock in companies within the same industry as a party, even where the outcome of the case will affect the whole industry. See, e.g., *In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir. 1986).

99. See *infra* Part II.A.2.

100. 28 U.S.C. § 455(b)(4).

101. See Bloom, *supra* note 27, at 678. Some commentators contend that this provision applies only to *pecuniary* insubstantial interests, *id.*, but the plain language of the statute does not support such an interpretation. See also Abramson, *supra* note 96, at 1073.

102. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3547, at 603 (2d ed. 1984), cited in *In re Va. Elec. and Power Co.*, 539 F.2d 357, 368 (4th Cir. 1976) (finding that the judge's potential for a \$70-\$100 utility refund was de minimis and therefore disqualification was not required). A judge's interest as taxpayer or ratepayer of a public utility is not disqualifying because it is akin to a "bare expectancy," too remote and diluted to be legally cognizable. See *In re N.M. Natural Gas Antitrust Litig.*, 620 F.2d 794, 796 (10th Cir. 1980) ("Congress did not intend to require disqualification in all cases in which the judge might benefit as a member of the general public."); *In re Va. Elec.*, 539 F.2d at 367-68. This is so unless the outcome of the suit could uniquely affect the amount to be paid by the judge. See *Disqualification When the Judge Is a Utility Ratepayer or Taxpayer*, 2 Advisory Op. U.S. Judicial Conference Comm. on Codes of Conduct No. 78 (1998), available at

the interest decrease, so does the need for recusal.¹⁰³ For example, an interest in a subsidiary or parent company of a party is evaluated as “any other interest.”¹⁰⁴ The judge must ascertain the level of control exercised by the parent over the subsidiary to determine whether recusal is required.¹⁰⁵ Under any of the clauses of subsection (b)(4), in order to constitute a cognizable ground for disqualification, the interest must be a “real, certain, present, immediate, and demonstrable financial interest... and one that is capable of estimated monetary valuation.”¹⁰⁶

Under subsection (b)(5), a judge is also disqualified if she or her spouse, “or a person within the third degree of relationship to either of them, or the spouse of such a person,” is a party to the proceeding or is known by the judge to have an interest that could be substantially affected by the suit.¹⁰⁷ In a class action, the judge or her family member’s stock holding can make either of them a putative or absent class member, and here again, confusion arises in determining whether the judge or her family member would, as such, be considered a “party.”¹⁰⁸

www.uscourts.gov/guide/vol2/78.html.

103. Evers, *supra* note 4, at 362.

104. See *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 205 F. Supp. 2d 158, 162-63 (S.D.N.Y. 2002).

105. *Id.* at 162-63.

The key question is whether the company in which the judge owns stock has effective control over the party to the litigation—that is, at least 50% of the voting stock or a majority of the capital interest in the party. . . . [B]ecause AOL and Intel [companies in which the judge owned stock, whose stock price would not be substantially affected by the outcome of the litigation] do not exercise control over any of the issuer defendants, my stock ownership does not trigger the disqualification provision of section 455(b)(4).

Id.; cf. *Key Pharm., Inc. v. Mylan Labs., Inc.*, 24 F. Supp. 2d 480, 484 (W.D. Pa. 1998) (holding disqualification unnecessary where the judge’s ownership interest was in the parent company with “diverse interests and revenues in the billions, [and] the litigation involves only one of its subsidiaries and one of its product lines and no substantial affect on the value of the stock of the parent has been shown.”). See also *Disqualification in a Case When Controlled Subsidiary of a Corporation in which Judge Owns Stock Is a Party*, 2 Advisory Op. U.S. Judicial Conference Comm. on Codes of Conduct No. 57 (1998), available at www.uscourts.gov/guide/vol2/57.html. Sen. Bayh once proposed amending § 455 to set an arbitrary cutoff point that would disqualify a judge owning stock in a company holding 10% of the corporate party, or in a company 10% of which was held by the corporate party. See *Disqualification of Judges and Justices*, *supra* note 34, at 753 n.73.

106. Flamm, *supra* note 20, § 7.4.1.

107. 28 U.S.C. § 455(b)(5)(i), (iii) (2000). The third degree of relationship, as defined by the civil law system, includes only blood relatives, namely: the judge’s or judge’s spouse’s parent, grandparent, uncle, aunt, brother, sister, niece, nephew, son, or daughter. Abramson, *supra* note 96, at 1065 n.72.

108. See *infra* Part II.A.2.

3. Subsection (c): Knowledge Is Power

Judges have a duty to stay informed about their financial holdings.¹⁰⁹ Subsection (c) requires a judge to "inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."¹¹⁰ Without subsection (c), judges could seek to avoid per se disqualification under subsection (b) by deliberately remaining ignorant of their investments. Even if they were not deliberately turning a blind eye, judges, like many passive investors who use brokers, often do not know exactly what is in their portfolios at a given moment.¹¹¹ Therefore, courts have devised "conflict check" procedures, often involving a "conflicts list," to identify potentially disqualifying financial holdings at the earliest possible time.¹¹² This is not a foolproof process, however.¹¹³

109. See 28 U.S.C. § 455(c).

110. *Id.*

111. See, e.g., *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 70, 80 (S.D.N.Y. 2001), *aff'd sub nom.*, *In re Certain Underwriter*, 294 F.3d 297 (2d Cir. 2002) [hereinafter *In re IPO*] ("I am really one of those sad investors. The brokers call, I say 'yes, goodbye'; they say 'sell,' I say 'yes, goodbye.'"); *Key Pharm., Inc. v. Mylan Labs., Inc.*, 24 F. Supp. 2d 480, 481 (W.D. Pa. 1998) ("My financial holdings in the form of stocks in my IRA account are handled by a professional investment management service and are not selected by me.").

112. "I obtain a daily report via . . . e-mail of the stocks in which the managers invest. Each day I and my secretary check the holdings against our list of pending cases. . . . Even when there is no change in the IRA or my private portfolio, the list must be checked because of the addition of new parties to existing cases." *Key Pharm.*, 24 F. Supp. 2d at 481 & n.1. The judge's portfolio may also change as a result of companies merging or being acquired. See *NEC Corp. v. Intel Corp.*, 654 F. Supp. 1256, 1258 (N.D. Cal. 1987), *vacated as moot on other grounds, appeal dismissed*, 835 F.2d 1546 (9th Cir. 1988); see also *United States v. Pappert*, No. CRIM.-A.-942001601, 1998 WL 596707, at *3 (D. Kan. July 29, 1998) (explaining that a court staff member was assigned to check conflicts). The chore can be onerous. "Given the three to four hundred pending cases and the multiplicity of parties, many of which are publicly held and have numerous affiliated entities, this is a daunting task." *Key Pharm.*, 24 F. Supp. 2d at 481 n.1. In some jurisdictions, local court rules require parties to submit certificates identifying any corporate or other parents, subsidiaries, or affiliates. See, e.g., New York (S.D. & E.D.) Local Civ. Rule 1.9. Sometimes, in large cases, the judge may hand over the information and ask the parties to conduct the conflict check. See, e.g., *In re IPO*, 174 F. Supp. 2d at 77-78.

113. See *supra* notes 15, 112; see also *Perpich v. Cleveland Cliffs Iron Co.*, 927 F. Supp. 226, 227 n.1 (E.D. Mich. 1996) (noting that the judge's discovery of the fact that a limited partnership in which he had participated owned stocks occurred by happenstance in conversation with his father); *In re Indus. Gas Antitrust Litig.*, No. 80-C-3479, 1985 WL 2869, at *5 (N.D. Ill. Sept. 24, 1985). One judge observed,

While I knew that my husband owned shares of IBM and Eastman Kodak, I did not know those companies were class members, and it was not apparent to me that such companies would be purchasers of industrial gas. While I do have some idea as to the likely consumers of cylinder quantities of industrial gas, because that subject has been discussed in the course of this litigation, I have no idea how or wh[y] companies such as IBM and Eastman Kodak use

In order to allow the parties to conduct their own investigations, the 1978 Ethics in Government Act¹¹⁴ requires judges to file annual financial disclosure forms with the clerk of court.¹¹⁵ Unfortunately, the forms are not designed to cover all the bases for disqualification under subsection (b). For example, holdings of less than \$1000 and gifts of less than \$100 are not disclosed on the forms, even though they are subject to § 455(b)(4)'s per se disqualification rule for financial interests.¹¹⁶ To forestall potential disruption to the litigation later on, the judge should disclose to the parties any financial conflict as soon as she becomes aware of it.

4. Subsection (f): A Time to Divest

Subsection (f) provides, in pertinent part:

Notwithstanding the preceding provisions of this section, if any . . . judge . . . would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she . . . or his or her spouse or minor child . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge, . . . spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.¹¹⁷

Congress added this subsection to § 455 in 1988 with the goal of addressing the situation in which a judge learns of an interest in a party when the litigation is already in an advanced stage.¹¹⁸ This

industrial gas.

Id.

114. Codified as 5 U.S.C. app. §§ 101-12 (2000).

115. *Id.* The judge must also sign a certification, subject to criminal and civil penalties, that she has complied with the disclosure requirements of § 455 and Canon 3 of the Code of Judicial Conduct. See CRC Report, *supra* note 39. Yet, "the mere fact that a judge has filed such a report does not conclusively establish that he possesses the knowledge of a financial interest in a party that is required for disqualification under § 455(b)(4)." Flamm, *supra* note 20, § 24.6.5, (citing *NEC*, 654 F. Supp. at 1258 ("[N]otwithstanding the statutory obligation to keep informed, it is only human for a judge's attention to flag or be distracted at times.")); see, e.g., CRC Report, *supra* note 39 (relating that judges had listed the stock holdings at issue on their disclosure forms but claimed to have subsequently forgotten about them).

116. See *In re Cement and Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1080-81 (D. Ariz. 1981); CRC Report, *supra* note 39.

117. 28 U.S.C. § 455(f) (2000). For the full text of this subsection, see *supra* note 67.

118. See *supra* notes 15-16 and accompanying text. In 1980, the Judicial Conference of the United States had proposed adding a subsection (f) which would allow a waiver of disqualification when a financial interest in a party was discovered after substantial judicial time, or in the absence of waiver, for the judge to remain on the case if he determined "that the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing

problem is especially common in class actions.¹¹⁹ A judge's interest in a class member may remain undiscovered even for years¹²⁰ because of the amount of time required to compile a full class list.¹²¹ Where the judge has invested "substantial judicial time" before she learns of the interest, subsection (f) allows the judge to continue presiding¹²² if she, her spouse, or minor child in the household divest of the interest,¹²³ provided that the interest is not one that could be "substantially affected by the outcome of the suit."¹²⁴ Subsection (f) would, hypothetically, apply even if the holding or the circumstances of the divestiture might reasonably call the judge's impartiality into question.¹²⁵

The meaning of "substantial judicial time" is open to wide interpretation. Since neither the statute nor the legislative history define the term, courts have tried tortuously to do so, with sometimes inconsistent results.¹²⁶ Where the pendency of a case is long enough to be counted in years rather than months and the judge has been actively working on it over that time, all courts would agree that subsection (f) is satisfied.¹²⁷ But one court has deemed the significant

with the matter to completion." Director of the Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States (Mar. 5-6; Sept. 24-25, 1980), at 81.

119. See *supra* notes 15-16 and accompanying text.

120. See *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 713 (7th Cir. 1986); *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1299-1300 (9th Cir. 1982).

121. *In re Cement Antitrust Litig.*, 688 F.2d at 1299-1300.

122. The judge must cease making any rulings in the case from the time the interest is discovered until it is divested. See *Union Carbide*, 782 F.2d at 714; Flamm, *supra* note 20, § 24.10.

123. Divestiture is always permissive. Congress hoped, however, that judges and their family members would oblige, rather than force reassignment of the case: "In most instances, it is anticipated that the judge or his family members would be cooperative in seeking to promote the public interest to [sic] avoiding the costs of delay or reassignment in this manner." H.R. Doc. No. 100-889, at 69 (1988).

124. 28 U.S.C. § 455(f) (2000). An interest consisting of a major stock holding in a closely held corporation, for example, would not be curable by divestment. See H.R. Doc. No. 100-889, at 69 (1988). It is the size of the interest relative to the corporation that is relevant to determining whether the interest could be "substantially affected by the outcome," rather than the size of the interest vis à vis the judge's portfolio.

125. See 28 U.S.C. § 455(f) (providing that the subsection applies "[n]otwithstanding the preceding provisions of this section [including subsection (a)]"). If the judge or her family member incurred considerable brokerage fees or capital gains taxes or lost out on an extraordinary market gain as a result of the divestment, a reasonable person might question whether the judge now harbors some grudge against that party to the litigation. Yet the language of subsection (f) does not take that reality into account.

126. See *infra* notes 127-29 and accompanying text.

127. See, e.g., *Kidder, Peabody & Co., v. Maxus Energy Corp.*, 925 F.2d 556, 561 (2d Cir. 1991) (concluding straightforwardly that subsection (f) applied because "nearly three years of the litigants' time and resources and substantial judicial efforts have been devoted"); see also *Key Pharm., Inc. v. Mylan Labs., Inc.*, 24 F. Supp. 2d 480, 482-83 (W.D. Pa. 1998) (holding that fourteen months was enough).

passage of time itself enough, despite the fact that the judge had devoted only minimal attention to the case during the two-year period.¹²⁸ On the other hand, the Second Circuit recently held that a mere two months—chock-full of organizational and managerial effort but no substantive orders—constituted “substantial judicial time.”¹²⁹ In another case, the Federal Circuit held that a judge’s divestment of a financial conflict of interest two months after the complaint was filed fit within subsection (f) because the motion for disqualification was not made until more than a year later.¹³⁰ It appears that unless a court has devoted only minimal time to a case in a short period before a motion for disqualification is brought, the judge can defend her cure by divestiture under the “substantial judicial time” requirement of subsection (f).

D. *The Code of Judicial Conduct*

In addition to the various constitutional and statutory bases for disqualification, a set of ethical rules also requires judges to recuse themselves under certain circumstances. The primary source of judicial ethics rules is the American Bar Association’s Code of Judicial Conduct.¹³¹ Although 28 U.S.C. § 455 takes precedence over the Code when requiring disqualification,¹³² there could be situations in which the statute would not mandate the judge’s recusal, but the spirit, if not the letter, of the Code would.¹³³

1. History

The ABA published the first Canons of Judicial Ethics in 1924.¹³⁴ These general, hortatory pronouncements did not prove very

128. See *Perpich v. Cleveland Cliffs Iron Co.*, 927 F. Supp. 226, 230 (E.D. Mich. 1996) (deeming two-year pendency of case enough to satisfy subsection (f) even though the judge had not entered any substantive decisions during that time, noting that the parties had spent substantial time on the case).

129. See *In re Certain Underwriter*, 294 F.3d 297, 299, 301-02, 304 (2d Cir. 2002). “[M]easuring ‘substantial judicial time’ means examining the time and effort a district court invests in a matter, rather than simply counting off days on the calendar to see if ‘substantial’ time passed.” *Id.* at 304.

130. See *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550 (Fed. Cir. 1996).

131. Flamm, *supra* note 20, § 2.6.1.

132. *Id.* § 2.6.3; H.R. Rep. 93-1453, at 2-3 (1974).

133. See *In re Cement and Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1079 (D. Ariz. 1981) (“Even if I could legally proceed with a case, I would refuse to do so if I were to determine that it was ethically improper.”); see also *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1320 (2d Cir. 1988); *Sch. Dist. of Kansas City, Mo. v. Missouri*, 438 F. Supp. 830, 835 (W.D. Mo. 1977).

134. Shaman, Lubet & Alfini, *supra* note 17, § 1.02. Chief Justice William Howard Taft headed the drafting committee. *Id.*

helpful.¹³⁵ A more concrete, less morally intoned set of Canons followed in 1972: The Model Code of Judicial Conduct.¹³⁶ This Code marked the first use of the "appearance of bias" test that was later incorporated into § 455(a).¹³⁷ A third, more minor revision took place in 1990, adding more detail to the rules.¹³⁸ All but one of the states¹³⁹ has enacted either the 1972 or 1990 versions of the Code.¹⁴⁰

The Judicial Conference of the United States, the administrative body governing the federal judiciary, has adopted the more recent version of the Model Code as the Code of Conduct for United States Judges.¹⁴¹ The effect of this measure is unclear. Because the Judicial Conference has no specific statutory grant of authority to enact binding ethical rules,¹⁴² the Code does not have the force of law.¹⁴³ As such, it is of minimal value to litigants as a basis for disqualifying a federal judge.¹⁴⁴ Still, the judge herself must give due consideration to the Code's ethical standards.¹⁴⁵ The Judicial Conference's Advisory Committee on Codes of Conduct also issues advisory opinions interpreting the Code for the aid of federal judges.¹⁴⁶

135. *Id.*

136. *Id.*

137. *See Disqualification of Judges and Justices*, *supra* note 34, at 745.

138. Shaman et al., *supra* note 17, § 1.02.

139. Montana remains the only non-Code state. *See id.* It does, however, have a set of judicial conduct rules similar to the Model Codes. *Id.*

140. *Id.*; *see also* Flamm, *supra* note 20, § 2.6 n.2.

141. Flamm, *supra* note 20, § 2.6 n.2. On the federal level, the Code covers district and appellate judges, but not justices of the Supreme Court. *Disqualification of Judges and Justices*, *supra* note 34, at 743 n.29.

142. Bassett, *supra* note 4, at 1230; *Disqualification of Judges and Justices*, *supra* note 34, at 744 n.29.

143. Bassett, *supra* note 4, at 1230. The Code's provisions do, however, "closely parallel those of § 455." *Id.*

144. *See* Flamm, *supra* note 20, § 2.6.3. According to one view, litigants have no standing to invoke the Code. *Id.* § 2.6.4.

145. *Id.* § 2.6.4. Just how much consideration a judge should give to the Code—particularly where its heightened concern with maintaining integrity and respect for the judiciary would warrant self-recusal even where § 455 would not—is unclear. *Id.* According to Judge John W. Oliver,

It is my view that the duty to recuse stated in the Code of Judicial Conduct . . . establishes a higher standard than that imposed by any of the various statutes passed by the Congress. It is clear to me that in some exceptional cases a judge may be under duty to deny a motion to disqualify based on statutory grounds but that, consistently with the higher standard enunciated in the Code . . . he should nevertheless take himself out of the case.

Sch. Dist. of Kansas City, Mo. v. Missouri, 438 F. Supp. 830, 835 (W.D. Mo. 1977).

146. *See* Shaman et al., *supra* note 17, § 1.11. The same question as to the proper amount of weight to be given exists with regard to the Advisory Opinions. *See In re Indus. Gas Antitrust Litig.*, No. 80-C-3479, 1985 WL 2869, at *3 (N.D. Ill. Sept. 24, 1985) ("Interpretation of the Code is within the Committee's charter, and the Committee's collective opinion is therefore entitled to some, but not controlling, weight in interpreting the statute.").

2. Canon 3: Disqualification

Canon 3(E)¹⁴⁷ of the 1990 Model Code of Judicial Conduct addresses disqualification. However, the first mention of the issue comes slightly earlier in the Canon under the listing of a judge's Adjudicative Responsibilities: "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required."¹⁴⁸ The grounds for disqualification identified in the Canon largely comport with 28 U.S.C. § 455,¹⁴⁹ with three exceptions.

First, a financial interest of the judge's "parent or child wherever residing, or any other member of the judge's family residing in the judge's household" is disqualifying under the Canon,¹⁵⁰ whereas 28 U.S.C. § 455(b)(4) only disqualifies a judge for an interest of the judge, his spouse, or minor child residing with him.¹⁵¹

Second, the Canon provides an exception for de minimis interests,¹⁵² in contrast to 28 U.S.C. § 455(d)(4), which defines a disqualifying financial interest as "ownership of a legal or equitable interest, however small."¹⁵³

Third, the Canon permits the parties to waive the judge's disqualification for "any basis... other than personal bias or prejudice concerning a party."¹⁵⁴ Section 455 takes a contrary approach, allowing waiver where the ground for disqualification is that the judge's impartiality might reasonably be questioned, but in no other circumstances, including financial interests.¹⁵⁵

As to the first of these differences, a judge would simply be

147. The equivalent section in the 1972 version is Canon 3(C). See Thode, *supra* note 64, at 14.

148. Model Code of Judicial Conduct, Canon 3(B)(1) (1990) [hereinafter Model Code], reprinted in Flamm, *supra* note 20, at app. A (containing the text of the entire Code).

149. See *supra* note 143; see also H.R. Rep. No. 93-1453, at 1, 3 (1974).

150. Model Code, Canon 3(E)(1)(c), *supra* note 148.

151. See 28 U.S.C. § 455(b)(4) (2000).

152. Model Code, Canon 3(E)(1)(c), *supra* note 148. This subsection of the Canon provides that the following interests are disqualifying: "an economic interest in the subject matter in controversy or in a party to the proceeding or... any other more than de minimis interest that could be substantially affected by the proceeding." *Id.* (emphasis added). Thus, by its plain language, the exception for de minimis interests seems to apply only to interests falling into the category of "any other interest." See *supra* notes 100-03 and accompanying text (discussing the meaning of the phrase "any other interest"). But see Shaman et al., *supra* note 17, § 4.20 (suggesting that the exception applies to all interests). Subsection (d)(iii) of Canon 3(E) also exempts de minimis interests. See Model Code, Canon 3(E)(d)(iii), *supra* note 148.

153. 28 U.S.C. § 455(d)(4).

154. Model Code, Canon 3(F), *supra* note 148. This provision differs slightly from the 1972 version of the Code, quoted *supra* note 64. Cf. 28 U.S.C. § 455(e) (allowing waiver in cases involving the possible appearance of partiality only).

155. See 28 U.S.C. § 455(e).

following a stricter path by adhering to the Canon. As to the other differences, however, the judge must abide by the narrower provisions of the statute.

3. Canon 4: Regulation of Business Activities

Canon 4 addresses the extent to which judges can engage in outside business pursuits. The Canon exhorts judges to “So Conduct [Their] Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.”¹⁵⁶ Judges should “not engage in financial and business dealings that . . . involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.”¹⁵⁷ Investing is expressly permitted,¹⁵⁸ but with a careful eye to the prevention of likely conflicts, the appearance of partiality,¹⁵⁹ and the need for recusal.¹⁶⁰ The Canon directs judges to manage their finances with the goal of minimizing the number of cases in which they will be disqualified, particularly by divesting of interests “that might require frequent disqualification.”¹⁶¹ The Code prohibits judges from occupying corporate positions or exercising any sort of control over a business, other than a family business.¹⁶²

The Code’s extensive guidelines and accompanying commentary may be helpful to judges in conducting their extra-judicial affairs. Similarly, Advisory Opinions interpreting the Code, whose disqualification provisions generally parallel the statute’s, have proved a useful resource for judges facing recusal motions.¹⁶³ But the 1974 amendment to § 455, which largely brought the statute into line with the Code’s approach to disqualification, diminished the latter’s

156. Model Code, Canon 4, *supra* note 148. See also Model Code, Canon 2, which cautions judges to “Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.”

157. Model Code, Canon 4(D)(1)(b), *supra* note 148.

158. Model Code, Canon 4(D)(4), *supra* note 148. “A judge has the rights of any other citizen, including the right to privacy of the judge’s financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge’s duties.” Model Code, Canon 4(I), Commentary, *supra* note 148.

159. See Model Code, Canon 4(D)(1), Commentary, *supra* note 148.

160. Model Code, Canon 4(D)(4), *supra* note 148.

161. *Id.* The feasibility of this advice in practice is open to question. See *supra* note 22 and accompanying text.

162. Model Code, Canon 4(D)(3), *supra* note 148.

163. See, e.g., *New Orleans Pub. Serv., Inc. v. United Gas Pipeline*, 719 F.2d 733, 735 (5th Cir. 1983); *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 205 F. Supp. 2d 158, 162 n.9 (S.D.N.Y. 2002); *Perpich v. Cleveland Cliffs Iron Co.*, 927 F. Supp. 226, 231 (E.D. Mich. 1996); *In re Indus. Gas Antitrust Litig.*, No. 80-C-3479, 1985 WL 2869, at *3, Ex. A, B (N.D. Ill. 1985); *In re Cement and Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1079 (D. Ariz. 1981).

relevance in this area of the law.¹⁶⁴ Nevertheless, litigants, and hence courts, continue to cite the Code as an alternative ground for disqualification decisions.¹⁶⁵

Contemporary judicial disqualification law takes a strict approach to financial interests, viewing an interest of any amount as vitiating a judge's impartiality. As Part II demonstrates, however, applying the language of 28 U.S.C. § 455 to real-world cases can present knotty problems for courts.

II. APPLYING THE STATUTE TO THE CASES: QUESTIONS AND INCONSISTENCIES

Currently, a federal judge faced with a decision about whether to recuse based on a financial interest will find herself in an area of the law fraught with questions for which there are often no satisfactory answers, particularly when it comes to class actions. Perhaps the only line in the sand is that a judge may never continue to preside over a case while knowing that she or a family member has a financial interest in the subject matter in controversy or in a party.¹⁶⁶ This part explores the caselaw on whether a putative or absent class member—out of hundreds, thousands, or even tens of thousands—counts as a “party to the proceeding,” or something short of that. It also examines whether a judge who becomes aware of a financial interest at an early stage of litigation can cure the conflict by divesting.¹⁶⁷ Finally, it outlines a previous proposal for amendment to 28 U.S.C. § 455 and the reasons for its failure.

A. *Adjudicating in Murky Waters*

Subsection (f) of 28 U.S.C. § 455, though intended to address class action situations,¹⁶⁸ is deficient in several respects. First, it covers only a financial interest “in a party,”¹⁶⁹ but fails to address whether or not class members and putative class members are to be considered

164. See H.R. Rep. 93-1453, at 1-2 (1974).

165. See *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1320 (2d Cir. 1988); *In re City of Houston*, 745 F.2d 925, 926-27 (5th Cir. 1984); *In re Va. Elec. and Power Co.*, 539 F.2d 357, 367 (4th Cir. 1976); *In re IPO*, 174 F. Supp. 2d 70, 88 (S.D.N.Y. 2001); *Alaska Oil Co. v. Alaska*, 45 B.R. 358, 360 (D. Alaska 1985); *LeRoy v. City of Houston*, 592 F. Supp. 415, 418-19 (S.D. Tex. 1984); *Sch. Dist. of Kansas City, Mo. v. Missouri*, 438 F. Supp. 830, 835 (W.D. Mo. 1977).

166. See 28 U.S.C. § 455(b)(4) (2000). For a discussion of the knowledge requirement of this provision, see *supra* Part I.C.3 and notes 94-95 and accompanying text.

167. The judge would need to suspend involvement in the case until the stock was sold. See *supra* note 122.

168. See *supra* notes 15-16 and accompanying text.

169. See 28 U.S.C. § 455(f).

parties. Second, subsection (f) does not contemplate the scenario in which a judge or a family member's current or prior stock ownership qualifies him or her as a class member or putative class member. Finally, the only family members mentioned are a spouse or minor child in the judge's household, leaving out the possibility that the conflict might belong to the judge's adult child or third-degree relative.¹⁷⁰ Conspicuously, because of subsection (f)'s deficiencies, cases decided since its enactment have had to grapple with some of the same questions as cases decided pre-amendment.¹⁷¹ Congress has yet to engage these questions by revisiting the statute.

1. The Special Problems of Class Actions

The complex nature of class actions creates unique challenges in the area of judicial disqualification.¹⁷² The source of the challenge is the difficulty in determining what constitutes a cognizable interest in the outcome of this kind of suit.¹⁷³ A typical class action may involve a large class of public corporations.¹⁷⁴ The judge or a family member

170. *Id.*

171. Compare *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998), and *In re IPO*, 174 F. Supp. 2d 70 (S.D.N.Y. 2001) (post-amendment cases), with *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710 (7th Cir. 1986), and *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982) (pre-amendment cases).

172. Both plaintiffs and defendants may be certified as a class; however, the majority of class actions involve plaintiff classes. Moore's Federal Practice: Manual for Complex Litigation (Third) § 25.4 (2000) [hereinafter Manual for Complex Litigation]. Rule 23(b) of the Federal Rules of Civil Procedure provides for three types of class actions. The first, known as a (b)(1) class action, is used in situations where individual suits would give rise to incompatible standards of conduct for the opposing party or impair, as a practical matter, the rights or interests of other members who were not parties to the suits. See Fed. R. Civ. P. 23(b)(1). The second type, a (b)(2) class action, is directed toward class injunctive or declaratory relief. *Id.* at 23(b)(2). The third type of class action falls under subsection (b)(3). Here, the relationship between the individual members is attenuated except that common questions of law or fact predominate over any others, and the court deems a class action the fairest and most efficient adjudication of the claims. *Id.* at 23(b)(3); see also Silberman, *supra* note 16, at 202. In (b)(3) class actions only, individual class members must be given notice and opportunity to opt out of the class, so a class list must be created. See Fed. R. Civ. P. 23(c)(2). For the purposes of this Note, it does not matter which type of class action is involved, only that the nature of the judge or family member's interest is financial (though the financial interest problem is more likely to arise in (b)(3) class actions). When the judge or family member's interest makes him or her a class member or potential class member, courts distinguish between classes where a financial interest is at stake (possibly requiring disqualification) and other classes such as civil rights classes (where disqualification is generally not required). See *In re City of Houston*, 745 F.2d 925, 928-29 (5th Cir. 1984) (holding that per se rule did not apply to judge who was a class member in voting rights case because her interest was non-pecuniary and the same as that of all members of the local public); Abramson, *supra* note 96, at 1069-77.

173. See Boniface, *supra* note 16, at 1294.

174. *Id.*

might own a small amount of stock in one or more of those corporations.¹⁷⁵ The number of companies involved in the suit magnifies the potential for the existence of some conflicting financial interest, however small, within the judge's family. The potential loss or benefit is also likely to be small, as recovery for individual class members is often minimal.¹⁷⁶

A paltry interest can be exploited as a litigation tactic. The conflicting interest is sometimes discovered by counsel after assiduous probing of the judge's financial records.¹⁷⁷ If even one plaintiff or defendant out of many in the suit moves for disqualification, the entire case must stop in its tracks until the judge can decide the motion.¹⁷⁸ A petition for review may follow if the judge denies the motion,¹⁷⁹ which further delays adjudication of the claims.¹⁸⁰

The myriad of potential class members and the relatively small sums at stake for the judge creates the specter of recusal becoming the rule rather than the exception. As the Supreme Court has noted,

With the proliferation of class actions involving broadly defined classes, the application of the constitutional requirement of disqualification must be carefully limited. Otherwise constitutional disqualification arguments could quickly become a standard feature of class-action litigation. . . . At some point, the biasing influence . . . will be too remote and insubstantial to violate the constitutional constraints.¹⁸¹

In order to keep the incidence of disqualification in such cases in

175. *Id.*

176. Accordingly, where no recovery is sought for individual class members, recusal is not warranted. *See Christiansen v. Nat'l Sav. and Trust Co.*, 683 F.2d 520, 526 (D.C. Cir. 1982).

177. *See supra* Part I.B.3 (discussing financial disclosure by judges); *see also* *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1300 (9th Cir. 1982) (several defendants advised judge that they had discovered his wife owned stock in seven of 210,235 class members); *Black v. Am. Mut. Ins. Co.*, 503 F. Supp. 172, 173 (E.D. Ky. 1980) (despite defendants' awareness of possible grounds for disqualification motion from the outset, they waited until just before trial when "intense settlement negotiations" were underway to make the motion).

178. *See In re Cement*, 688 F.2d at 1300; *In re IPO*, 174 F. Supp. 2d 70, 72 (S.D.N.Y. 2001) (thirty-eight defendant underwriters out of more than 1000 defendants moved for judge's recusal).

179. An order denying a motion to recuse is interlocutory and, therefore, not immediately appealable. 3-23 James Wm. Moore et al., *Moore's Manual: Federal Practice and Procedure* § 23.34(5)(b) (3d ed. 2002). Most circuit courts, however, allow parties to challenge a district judge's denial of a recusal motion by seeking a writ of mandamus. *Id.* Nevertheless, because recusal decisions are evaluated by the deferential abuse of discretion standard, it is rare for the circuit court to grant the writ. *Id.*

180. The challenged judge may not rule on any further motions while the appeal is pending. *See Flamm, supra* note 20, § 22.1.

181. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986) (internal citations and quotation marks omitted).

check, and to provide judges facing these motions with a firmer basis for decision, the statute must establish clearer and more realistic standards than does the current § 455.

2. Who Is a "Party"?

One of the most conspicuous problems in determining whether the judge must recuse herself from a class action is whether the judge's financial interest qualifies her as a "party." A party is one by or against whom a lawsuit is brought.¹⁸² In a regular case, identifying the parties is simple; a mere look at the pleadings will answer the question. In a class action, however, the question becomes somewhat complicated.¹⁸³ The class consists of named representatives who litigate claims on behalf of the class, as well as any number of unnamed, or absent, class members.¹⁸⁴ Ascertaining exactly who belongs to that group often takes significant time.¹⁸⁵ First, the class must be defined; second, it must be certified; and third, its members must be identified.¹⁸⁶ Because of the potentially high stakes the unified suit will present for the opposing parties, the decision to certify a class demands serious judicial consideration, including a hearing and discovery.¹⁸⁷ Before the class list is compiled, it will sometimes be hard to identify who will be in the class.¹⁸⁸

In other cases, the judge might be able to identify potential, or putative, class members in advance of certification.¹⁸⁹ The problem

182. Black's Law Dictionary 917 (7th ed. 2000).

183. If an action is filed as a class action, or even styled as one without expressly saying so, the court must treat it as one until it has determined otherwise. See *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 446 (5th Cir. 1973); Manual for Complex Litigation, *supra* note 172, § 30.11.

184. See Fed. Rule Civ. P. 23(a).

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

185. See *supra* note 15.

186. See Manual for Complex Litigation, *supra* note 172, §§ 30-30.23. A class list is necessary in a (b)(3) class action, where the Rule mandates notice and opportunity to opt out; Rules 23(b)(1) and (b)(2) do not have these requirements, but a court may impose them in some cases. *Id.* § 30.14.

187. See *id.* §§ 30.12-30.13. "The decision on whether or not to certify a class, therefore, can be as important as decisions on the merits of the action and should be made only after consideration of all relevant evidence and arguments presented by the parties." *Id.* § 30.1. The Rules call for certification "as soon as practicable." Fed. R. Civ. P. 23(c)(1).

188. See *supra* notes 15, 113.

189. See, e.g., *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1027 (5th Cir. 1998); *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 205 F. Supp. 2d 158, 160-62

remains, though, that the status of putative class members is not clear under § 455, which uses only the term “party.”¹⁹⁰ The judge might be alerted to the fact that she or her family member is a potential class member, or holds an interest in a potential class member, but will find no guidance in the statute as to whether she must recuse on this basis. Most courts have held that a putative class member does not constitute a party.¹⁹¹ Their reasoning is that the interest of putative class members is too speculative, dependent as it is on possible certification of the class at some future date. In *LeRoy v. City of Houston*, the district court encapsulated this approach: “Certification would be a meaningless step if all entities whom a named plaintiff sought to represent were constrained by the mere filing of the action. The interests of a potential member of a class are too ‘uncertain’ to justify holding those potential members to be parties under § 455.”¹⁹² Without conceding that members of a certified class would be considered parties, the judge in this voting rights case saw a danger in placing the bar for classification as a “party” so low as to include someone who was perhaps “briefly over a decade ago within the putative class.”¹⁹³ This approach assumes that not every putative class member will end up part of a certified class, either because he or she turns out to be excluded by the class definition, or because the court ultimately denies class certification.

In contrast, the Fifth Circuit in *Tramonte v. Chrysler* held that where the judge, her spouse, or minor child in the household is a putative class member, “there exists a financial interest in the case mandating recusal under § 455 (b)(4).”¹⁹⁴ On the other hand, the court also stated that if an interest is held by the judge’s third-degree relatives, for example, making them putative class members, they are *not* parties under subsection (b)(5), and the judge need only consider whether there is any appearance of partiality requiring recusal under subsection (a).¹⁹⁵ The court expressed its rationale this way:

(S.D.N.Y. 2002).

190. A judge is disqualified where “[h]e knows that he . . . or his spouse or minor child . . . has a financial interest . . . in a party,” 28 U.S.C. § 455(b)(4) (2000), or “[h]e or his spouse, or a person within the third degree of relationship . . . [i]s a party.” *Id.* § 455(b)(5)(i) (emphasis added).

191. See *New Orleans Pub. Serv. v. United Gas Pipe Line Co.*, 719 F.2d 733, 735 (5th Cir. 1983); *MDCM Holdings*, 205 F. Supp. 2d at 161; *LeRoy v. City of Houston*, 592 F. Supp. 415, 419 (S.D. Tex. 1984); *United States v. Alabama*, 582 F. Supp. 1197, 1203, 1208 (N.D. Ala. 1984); see also *Palais Royal, Inc. v. Partida*, 916 S.W.2d 650, 653 (Tex. Ct. App. 1996).

192. *LeRoy*, 592 F. Supp. at 419.

193. *Id.* at 420. The class definition must specify a time period during which one had to have met the relevant criteria in order to be a member of the class. See *Manual for Complex Litigation*, *supra* note 172, § 30.14.

194. *Tramonte*, 136 F.3d at 1030.

195. *Id.* at 1030-31.

The fact that a class has not yet been certified unquestionably diminishes the expected value of the outcome of the litigation to the interested judge, as it makes a financial recovery less certain. Yet recovery in any matter that has not reached a final judgment is uncertain; otherwise, there would be no case or controversy. Because § 455(b)(4) requires recusal for even paltry financial interests, the increased uncertainty of recovery in the precertification stage of a class action affects the size but not the existence of a disqualifying financial interest. The decision on a request to certify is itself a critical step, often with large financial consequences. An assertion that a member of a putative class lacks a financial interest relevant to the trial court's decision until after the class is certified blinks at reality.¹⁹⁶

This approach essentially sidesteps the question of whether a financial interest in a putative class member is a financial interest in a party under subsection (b)(4). The court concludes without explanation that such an interest is always an interest in "the subject matter in controversy," rather than considering that it might instead be classified as "any other interest" in the "outcome of the proceeding."¹⁹⁷ If it is the latter, it would be subject to the *per se* disqualification rule only if the potential impact of the outcome is substantial.¹⁹⁸ If the interest in the putative class member could not be substantially affected by the outcome, subsection (b)(4) would allow the judge to continue to preside. Indeed, the financial interest of putative class members, and even more so the interest of one who merely possesses an interest in a putative class member, will often be

196. *Id.* at 1030. One rationale for this view is that a settlement agreement conditioned on class certification sometimes occurs before a formal ruling on the class. See 2 Newberg & Conte, *supra* note 16, §§ 11.09, 11.22, 11.27. In this situation, certification will simultaneously dispose of the case. In a sense, that contingency puts the interest of putative class members on par with the interest of members of a certified class.

197. *Tramonte*, 136 F.3d at 1030; see also *In re City of Houston*, 745 F.2d 925, 928-29 n.6 (5th Cir. 1984) ("The issue is not before us whether a member of a class is a party where the interest involved is pecuniary. Yet we doubt that the question need ever be reached, since where the interest is pecuniary the judge will be disqualified under the *per se* rule . . ."). But see *In re IPO*, 174 F. Supp. 2d 70, 91 n.32 (S.D.N.Y. 2001), where the court noted:

Whether this Court actually had a 'legal or equitable interest' at such an early stage might be disputed given that bare expectancies usually have little weight in the law. *Second*, the phrase 'subject matter in controversy' might not extend to class actions. As one judge complained: 'I find the term "subject matter in controversy" to be inherently vague. . . . While it obviously applies to *in rem* proceedings, Congress has not indicated whether it is limited to such proceedings and, if it is not, how far the term extends.'

Id. For a discussion of the definitions of these terms, see *supra* Part I.B.2.

198. See 28 U.S.C. § 455(b)(4) (2000); *In re IPO*, 174 F. Supp. 2d at 91-92; *Gordon v. Reliant Energy, Inc.*, 141 F. Supp. 2d 1041, 1045 (S.D. Cal. 2001) (suggesting this view).

inconsequential, and therefore the substantiality-of-the-potential-impact approach may be the more appropriate.

A judge who, after class certification, discovers a financial interest in an absent class member will similarly not find § 455 very instructive. The status of absent class members in a certified class remains unspecified in the statute, which refers only to a "party."¹⁹⁹ Lacking any insight into Congress's intent,²⁰⁰ most courts have assumed that absent class members do have the status of parties,²⁰¹ at least for the limited purposes of § 455.²⁰² The rationale is that "class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment."²⁰³ It is true that, in some respects, absent class members resemble parties: Unless they have opted out, they are included in the judgment and bound for res judicata purposes; they may appeal from an order approving a settlement; and in diversity cases brought under Rule 23(b)(3),²⁰⁴ each class member must satisfy the amount in controversy requirement.²⁰⁵ In other ways, however, the treatment of absent class members differs significantly from that of parties: For diversity jurisdiction, only the class representatives need be diverse from the opposing parties; some courts have held that class members are not subject to discovery; other courts have held that class members should not be treated as parties for purposes of counterclaims.²⁰⁶ Absent class members also

199. See *supra* note 190 and accompanying text.

200. See *In re Cement and Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1079 (D. Ariz. 1981) ("Despite the proliferation of class-actions in this country, there is no indication that Congress directly considered the question whether 'party' under (b)(4) should be read to include 'class member.'").

201. See *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 735 (5th Cir. 1983); *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1310 (9th Cir. 1982); *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 205 F. Supp. 2d 158, 161 (S.D.N.Y. 2002) ("Of course, if the class were already certified and it included this Court, the Court would be [a] 'party to the proceeding.'" (internal citations omitted)); *LeRoy v. Houston*, 592 F. Supp. 415, 419 (S.D. Tex. 1984); see also *Judges' Duty to Inquire When Relatives May Be Members of Class Action*, 2 Advisory Op. U.S. Judicial Conference Comm. on Codes of Conduct No. 90 (1998), available at www.uscourts.gov/guide/vol2/90.html.

202. See *In re Cement*, 688 F.2d at 1310.

We need not decide the general question of whether class members are in fact "parties" to a class action suit; for some purposes they are treated as such, and for other purposes they are not. Here, we need decide only if, for purposes of section 455, stock ownership in a class member constitutes an interest in "a party to the proceeding."

Id.

203. *Id.* at 1309.

204. Fed. Rule Civ. P. 23(b)(3).

205. See *In re City of Houston*, 745 F.2d 925, 929 n.7 (5th Cir. 1984) (citing cases); *In re Cement*, 688 F.2d at 1309-10 (same).

206. See *In re City of Houston*, 745 F.2d at 929 n.7 (citing cases); *In re Cement*, 688 F.2d at 1309-10 (same); see also 1 Newberg & Conte, *supra* note 16, § 1.03.

differ from parties in that they play no active role and have no input in the litigation of the case.²⁰⁷ Further, the amount of money at stake for individual class members, as well as the potential effect on a financial interest in a class member, is likely to be much smaller than in a regular case because the judgment is diffuse among such a large number of entities.²⁰⁸

Either way, for practical purposes in adjudicating disqualification motions, it seems illogical to have different rules for putative class members and members of a certified class. If the issue is raised early on, when there is only a putative class, then according to the majority of courts, a judge who is a putative class member or who owns stock in one would not be required to recuse herself. However, if the issue is raised after the subsequent certification of the class, most courts would require the judge's disqualification. And yet recusal at that later stage, assuming no divestiture, would be that much more costly and disruptive.²⁰⁹ A uniform rule avoids making the timing of the motion, rather than the existence of a stake in the litigation, the decisive factor.

3. When Can Divesting Cure the Conflict?

Consider a judge who discovers that she owns stock in a member of the class in a class action pending before her, and wishes to sell the shares in order to avoid recusal. Subsection (f) permits divestiture of a financial interest in a party discovered after the expenditure of "substantial judicial time."²¹⁰ The judge would first need to examine, then, whether this criterion is satisfied. If it is, neither the fact of the prior stock holding nor the divestment itself would be subject to the appearance of bias test of subsection (a); rather, the option to divest would be available only if the interest were not one that could be substantially affected by the outcome of the proceeding.²¹¹ The question remains, however, whether this provision for cure by divesting is an exclusive one—available only under the circumstances described in subsection (f)—or whether the judge's sale of a conflicting stock interest early in the case, subject to subsection (a),

207. See *supra* note 184; *infra* notes 273-75 and accompanying text.

208. See, e.g., *In re Cement*, 688 F.2d at 1313 (judge's wife had a maximum of \$29.70 at stake).

209. Notably, in reaching its holding, the Ninth Circuit in *In re Cement* remarked: "[N]or would we necessarily agree that there is no logical or rational basis for drawing a distinction between ordinary civil cases and class actions for purposes of enacting appropriate statutory recusal provisions. . . . [T]he application of section 455 to class actions creates substantial administrative burdens" *Id.* at 1310 n.14.

210. 28 U.S.C. § 455(f) (2000). This discussion assumes, *arguendo*, the position that an absent class member is considered a party.

211. *Id.*; see also *supra* notes 124-25 and accompanying text.

eliminates the need for recusal. Put another way, does the subsection (b) per se rule preclude divestiture as a remedy, or merely proscribe a judge's participation in a case when she has knowledge of an existing financial interest? Courts facing this scenario have reached opposing conclusions both before and after the adoption of subsection (f).

In *Union Carbide Corp. v. U.S. Cutting Service*,²¹² the Seventh Circuit held that because the judge had made no rulings between the date she discovered her husband's stock interest and the date of divestment,²¹³ she did not violate subsection (b)(4):

Since the statute forbids only the knowing possession of a financial interest, since Judge Getzendanner relinquished control of the case as soon as she found out about the financial interest, and since she did not resume control until the financial interest was eliminated, at no time was she in literal violation of the statute.

... Before she discovered she had a financial interest, she could have had no incentive to favor the plaintiffs; when she knew she had such an interest, she made no rulings in the case; now, when she has no interest, she cannot enrich herself by favoring the plaintiffs. The statutory purpose would not be served by forcing her to recuse herself.²¹⁴

The court also considered whether divestment in this case had created any appearance of partiality under § 455(a), and concluded that it had not.²¹⁵ Although the judge's husband paid \$900 in

212. 782 F.2d 710 (7th Cir. 1986).

213. "Although the case was not formally reassigned to another judge, any matters requiring a judicial ruling were referred to other judges; it was as if she had recused herself." *Id.* at 714; accord Removal of Disqualification by Disposal of Interest, 2 Advisory Op. U.S. Judicial Conference Comm. on Codes of Conduct No. 69 (1998), available at www.uscourts.gov/guide/vol2/69.html.

Accordingly, if a judge learns of a disqualifying financial interest in a party before expending judicial time on the case, the judge may avoid disqualification by divesting himself or herself of the interest. Since in this situation, a judge could in any event recuse, divest and then have the matter reassigned to the judge, the Committee has concluded that ... any other interpretation would require the judge to do a futile act.

Id.

214. *Union Carbide*, 782 F.2d at 714. Because almost five years had passed between the time the suit was assigned to Judge Getzendanner and the time she discovered the conflicting interests, this case would have warranted the application of subsection (f) of § 455 had it been in effect at that time. The court, however, did not base its holding permitting divestment on the advanced stage of the litigation. The district court, in denying the recusal motion, had distinguished this case from *In re Cement*, in which the judge was forced to recuse after more than three years based on his wife's stock holdings. See *In re Indus. Gas Antitrust Litig.*, No. 80-C-3479, 1985 WL 2869, *2 n.3 (N.D. Ill. Sept. 24, 1985) (discussing *In re Cement*). The *In re Cement* court did not even discuss the divestiture issue, apparently because the judge's wife had declined to sell the stocks. *In re Cement*, 688 F.2d 1297; see also *supra* note 70.

215. *Union Carbide*, 782 F.2d at 715.

brokerage fees to sell the stock and gave up the chance for future appreciation, the court held that, under the circumstances, this volitional act did not create “the slightest indication that [the judge] has in fact any partiality in this matter.”²¹⁶ One judge dissented, arguing that § 455(b) “is absolute in language and contains no provision for cure.”²¹⁷ The majority’s approach, he asserted, “engrafts the once-vanquished substantiality standard onto [§ 455(b)] via section 455(a).”²¹⁸

Fifteen years later—and thirteen years after the enactment of subsection (f)—the U.S. District Court for the Southern District of New York in *In re IPO*²¹⁹ employed substantially the same logic as the Seventh Circuit in *Union Carbide*. In denying a disqualification motion filed only a few months after more than 1000 consolidated class actions had come before the judge, Judge Scheindlin marshaled a host of historical sources to illustrate the proposition that “prospective cure” by divestment—selling a conflicting interest at the outset of a case, before any substantive rulings had been issued—had always been so widely accepted as permissible that it did not merit specific mention in the statute.²²⁰ The Second Circuit upheld this ruling,²²¹ but made no findings on the district court’s analysis of subsection (b).²²² Instead, the court determined that subsection (f) was applicable because of the level of managerial and administrative effort the court had invested in the case, albeit in a short period of time.²²³ The Second Circuit’s discussion of subsection (f), however, suggests that it views that provision as the exclusive province of the divestment

216. *Id.* at 716. The judge’s husband incurred no capital gains tax because he had a tax-free account; he put the proceeds into the money market, suggesting that he may have wanted to get out of the stock market anyway. *Id.* at 713, 716. The court also believed the \$900 brokerage fee to be too small to warrant a reasonable person to question the judge’s impartiality in the case. *Id.* at 716. “It is one thing to assume that judges are human beings with the usual human emotions and another to attribute to them a malevolent, a calculating, vindictiveness.” *Id.*

217. *Id.* at 717 (Flaum, J., dissenting). The argument is that disqualification attaches immediately at the moment that the interest comes to light. *Id.*

218. *Id.* at 718.

219. 174 F. Supp. 2d 70 (S.D.N.Y. 2001).

220. *Id.* at 72, 80-87; see also *supra* note 66 and accompanying text (discussing role of assumption about possibility of divesting insubstantial interests as one rationale for enacting per se rule). According to the court, once a judge had made substantive rulings, such as was the case in *In re Cement*, divestment would no longer avail as a cure because there would be no way to retroactively repair the impropriety. *In re IPO*, 174 F. Supp. 2d at 86-87. However, it would seem that if the judge was unaware of the conflicting interest at the time she issued the rulings, there would be no violation of the statute and no ground for questioning the judge’s impartiality. Where the judge or her family member is willing to divest upon learning of the conflict, such a move would cure *prospectively* the violation that would otherwise arise at that point.

221. See *In re Certain Underwriter*, 294 F.3d 297, 303-04 (2d Cir. 2002).

222. *Id.*

223. *Id.*

remedy.²²⁴

The Fifth Circuit, in *Tramonte v. Chrysler*,²²⁵ reached the opposite conclusion from the district court in *In re IPO*. The court held that subsection (f) signified the sole provision for curing a financial interest, and that where it was inapplicable, divestiture was not an option for avoiding disqualification.²²⁶ The court adopted the view of the dissent in *Union Carbide*, asserting that Congress had based subsection (f) in part on that position.²²⁷ Similarly, the Sixth Circuit has held that "the existence of section 455(f) suggests that Congress intended to exclude the types of cure not permitted by this provision,"²²⁸ for Congress had the opportunity to enact a broader amendment than it devised with section 455(f).²²⁹ This argument, of course, goes to the interpretation of the existing statute rather than the merits of allowing judges to divest of financial interests.

Interestingly, several cases reading subsection (f) to deny a motion for disqualification have indicated that the divestiture of the interest cures any possible conflict, rather than focusing on the expenditure of substantial time as the operative rationale.²³⁰ This emphasis reveals an essential truth about minor financial interests: In the majority of cases, they can be cleanly eliminated, leaving no trace of bias nor any appearance of partiality.

224. The Second Circuit stated:

The case before us falls squarely within the situation envisioned by Congress—a district judge with a minor interest in a class action lawsuit discovered after assignment, who quickly divested herself of the conflicting interest. Congress clearly did not envision class membership as an interest ... "substantially affected by the outcome," otherwise § 455(f) could not solve the very problem it was meant to remedy.

Id. at 304.

The Second Circuit's decision, however, was at odds with its reasoning, since the judge had other conflicts not contemplated by the "interest in a party" language of subsection (f): She herself had been a putative class member, and her adult son had owned stock in a party that made him a putative class member as well. Both Judge Scheindlin and her son had divested of their interests and waived class membership. *See In re IPO*, 174 F. Supp. 2d 70, 77-80 (S.D.N.Y. 2001). The circuit court did not address these issues.

225. 136 F.3d 1025 (5th Cir. 1998).

226. *Id.* at 1031.

227. *Id.*; see *supra* notes 217-18 and accompanying text.

228. For instance, subsection (f) excludes situations where "substantial judicial time" has not been expended, or the interest is one that "could be substantially affected by the outcome." 28 U.S.C. § 455(f) (2000).

229. *In re Aetna Cas. and Sur. Co.*, 919 F.2d 1136, 1147 (6th Cir. 1990).

230. See, e.g., *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 561 (2d Cir. 1991); *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 0150, 2000 WL 1585078, at *2 (S.D.N.Y. Oct. 24, 2000) ("Any conceivable impartiality was cured when this Court divested its interest in The Chase Manhattan Corporation, pursuant to § 455(f)"); *Perpich v. Cleveland Cliffs Iron Co.*, 927 F. Supp. 226, 231-32 (E.D. Mich. 1996).

B. An Aborted Step Toward Reform

The judiciary is not alone in noting the uncertainties regarding class membership under 28 U.S.C. § 455. In 1985, Congressman Robert Kastenmeier proposed adding a new provision to § 455 to delineate the status of absent class members.²³¹ His proposal read:

For purposes of this section, an absent class member in a class action shall not be considered to be a party or to have a financial interest in the subject matter in controversy, but shall be considered to be a person with an interest that could be affected by the outcome of the proceeding.²³²

Under this categorization, a judge in a given case would evaluate whether her interest as an absent class member stood to be *substantially* affected by the outcome of the proceeding.²³³

Congressman Kastenmeier's proposal met with criticism from the Office of Legal Policy of the U.S. Department of Justice.²³⁴ In a letter to the House Judiciary Committee, the Justice Department raised several objections.²³⁵ First, the Department expressed concern that "[e]ven if a judge's potential gain or loss from the outcome of a case is slight, adversely affected parties may feel or allege that a judge would identify psychologically with the interest of enterprises in which he or his family have a significant investment."²³⁶ The Justice Department also objected to having different standards for absent class members and named class representatives.²³⁷

Finally, the Justice Department raised concerns about the application of the proposed subsection to other parts of the statute using the word "party," namely subsection (b)(1), which disqualifies a judge for "personal bias or prejudice concerning a party," and subsection (d)(4), which defines a financial interest to include a position as "director, adviser, or other active participant in the affairs of a party."²³⁸ Since these subsections would now be read not to include class members, a judge might have bias or prejudice concerning a class member, or she or her family member might serve

231. See H.R. 3044, 99th Cong. (1985). Congressman Kastenmeier, a representative from Wisconsin, chaired the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee. *Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 99th Cong. 112-17 (1985).

232. H.R. 3044, 99th Cong. (1985).

233. See 28 U.S.C. § 455(b)(4), (5)(iii) (2000).

234. See Letter of Assistant Attorney General Spears, *Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, *supra* note 231, at app. II.

235. *Id.* at 113-17.

236. *Id.* at 114.

237. See *id.*

238. *Id.* (citing 28 U.S.C. § 455(d)(4)).

as a “director, advisor, or other active participant in the affairs of” a class member, and the judge would still not be disqualified under the respective subsections.²³⁹ Due to the objections raised to Congressman Kastenmeier’s proposal, it failed to be enacted and has languished ever since. The problems in this area of the law, however, have persisted. The next part of this Note proposes possible solutions to these problems in the form of amendments to 28 U.S.C. § 455.

III. PROPOSING AMENDMENT

Deficiencies in the current 28 U.S.C. § 455 and the resulting confusion in the caselaw have created a need for amendment. There are, in addition, other policy reasons for amending the statute. This part of the Note discusses those policy reasons, and also analogizes financial interest cases to other types of conflicts where the statute affords judges more discretion. The part then proposes two amendments. First, it offers a modified version of Congressman Kastenmeier’s proposal to define the status of absent and putative class members. Second, it proposes several changes to the current subsection (f) in order to make divestment a more widely available remedy. The part then addresses potential arguments against the proposals. Finally, the part illustrates how the hypothetical scenarios which began this Note would be resolved under the amended § 455. The law of judicial disqualification must keep pace with the times or risk losing its claims to both fairness and efficiency.²⁴⁰ The proposed amendments seek to achieve a better balance between these competing goals.

A. *More Reasons for Reform*

The lack of consistency in the way courts have construed § 455—namely, with regard to the status of putative and absent class members and the permissibility of curing financial interests by divesting—reveals a serious need for Congress to clarify the statute via amendment. There are, in addition, other reasons that amendment is in order, particularly as a means of injecting more flexibility into the statute.

The interpretation of the current § 455 that has been adopted by some courts has several damaging effects. First, holding that every class member is a party and therefore that even a small financial interest in a class member (or of a class member) is automatically disqualifying, and that divestiture is not permitted to cure the conflict

239. *Id.* at 114-15.

240. *See supra* Part I.A. Indeed, it is in the nature of every balancing test to require continual adjustment.

except if some indefinite amount of time has been clocked, creates the likelihood of frequent, almost routine, disqualifications, particularly in large class actions involving hundreds or thousands of companies.²⁴¹ Such disqualifications come at a great cost in time, money, effort, and efficiency to the system and to the opposing parties in these cases, especially in smaller or more rural districts.²⁴²

Second, this interpretation of the statute effectively limits the pool of judges able to hear such cases to non-investors with less knowledge of and experience in the subject matter of the cases before them.²⁴³ Of

241. "With the proliferation of class actions involving broadly defined classes, the application of the constitutional requirement of disqualification must be carefully limited." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986). "Prudence might therefore require, if Union Carbide's position on recusal of Judge Getzendanner were sustained, that all judges owning securities of individual companies recuse themselves from any class action in which the plaintiff class included companies." *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 714-15 (7th Cir. 1986); *see also* *In re Cabletron Sys., Inc.* 311 F.3d 11, 22 (1st Cir. 2002) (securities class action requiring recusal of four judges).

242.

The court notes that each of the other judges in this district are fully occupied with heavy dockets, and geographically are located a minimum of 100 miles from the situs of the Covington division. Therefore, finding a replacement judge would be difficult and impede efficient judicial administration. . . . [I]f the motion is granted, it will have the effect of denying the opposing parties the reasonably prompt day in court to which they are entitled.

Black v. Am. Mut. Ins. Co., 503 F. Supp. 172, 174 (E.D. Ky. 1980). "Also, other costs must be considered. . . . Reassignment . . . would cause great inconvenience to the counsel, parties, or judge, particularly if the litigation takes several years to complete." *In re N.M. Natural Gas Antitrust Litig.*, 620 F.2d 794, 797 (10th Cir. 1980); *see also* Bloom, *supra* note 27, at 700 ("The [per se disqualification] rule is not only inflexible, but ignores the important concerns of avoiding waste of judicial resources and preventing unnecessary delays in litigation.").

One commentator has pointed out an additional problem the rule creates on the circuit court level:

The rule . . . hampers administration of the federal judicial system by hindering the ability of the courts of appeals to conduct en banc reviews of panel decisions. En banc reviews are difficult in many circuits because the per se rule frequently disqualifies so many circuit judges that not enough remain to grant a rehearing.

See Bloom, *supra* note 27, at 700.

243.

To hold that Judge Getzendanner is violating section 455(b) might have the practical effect . . . of disqualifying from presiding over class actions a large fraction of the federal judges in the United States. . . . Class action judges would be drawn from the subset of judges that happen not to own such securities.

Union Carbide, 782 F.2d at 714-15. Commentators, too, have recognized this risk:

The other side of the constitutional argument is that limiting the pool of available judges actually restricts effective due process:

The impact of recusals on the large corporation is both obvious and subtle. Obviously, recusals limit the pool of judges available to hear a case. The stricter the ethical standards, the more recusals and the smaller the pool of judges. More subtly, some recusals affect the type of judge left in the pool. For example, recusal standards which penalize intelligent investors . . . may

course, just because a judge does not invest in the stock market does not mean she is any less smart or capable than one who is a financial wizard. But even if interpreting the statute this way is not a problem in individual cases, it cumulatively creates a situation where all the caselaw on, for example, securities class actions, would be written by non-investors.²⁴⁴

Finally, the rigid application of the *per se* rule places a disproportionate emphasis on a judge's financial ties, and often produces anomalous, logically inconsistent outcomes.

While having a financial stake in a case may create a real conflict of interest, money is by no means the only or most powerful influence on people's judgment. As Winston Churchill noted, people are far more likely to be corrupted by friendship than by anything else. Frankly, most reasonable people might be relatively unconcerned that Justice O'Connor would be influenced in her vote on a case by how the court's decision might affect the value of a few shares of stock that she owns, and far more concerned if she were voting to grant or deny a petition that would bankrupt a close friend. However, under the current standards, disqualification in the former is automatic and in the latter it is virtually unheard of.²⁴⁵

Neither the legislative history of § 455 nor common sense justifies treating all manner of financial interests with such exceptional rigidity. Amending the statute will rein in the undesirable outcomes of its application, while at the same time providing judges with a clearer basis to determine when recusal is necessary and when it is not.

well eliminate the types of jurists most able to comprehend the position of the large corporation.

Thus, the strict standard as applied to class actions which affect investors can deny class member companies access to "as full, balanced and representative a range of judges as is available to other small litigants."

Boniface, *supra* note 16, at 1303 (quoting Levy, *supra* note 22, at 36-37).

Disqualifying a judge not only removes someone found worthy by the President and Senate; it also affects the overall mix of judges. Suppose one thinks of the judiciary as representing, in a rough way, social groups. One might then condemn some disqualification rules as undemocratically eliminating one class of judges from certain cases.

Leubsdorf, *supra* note 25, at 270-71.

244. See *supra* note 243.

245. Bleich & Klaus, *supra* note 20, at 17-18; see also Bassett, *supra* note 4, at 1242-43 ("[A] dichotomy currently exists between financial and most non-financial interests: any doubts about potential bias resulting from a financial interest are resolved in favor of recusal, whereas any doubts about potential bias resulting from most non-financial interests often tend to be resolved in favor of participating in the case."); Leubsdorf, *supra* note 25, at 238 (giving examples of inconsistent outcomes under the statute); Brian P. Leitch, Note, *Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies*, 67 Iowa L. Rev. 525, 527 (1982) ("Under the current law, judicial disqualification may be required when no reasonable person would doubt a judge's impartiality.").

B. *Room for Comparison?*

An examination of other types of judicial conflict cases where disqualification is not automatic makes clear not only that the current state of the law creates uneven standards, but that in other contexts judges are entrusted with discretion to decide whether recusal is required and are generally deemed well able to do so. Many types of personal or political attachments do not subject the judge to per se disqualification. For example, Catholic judges are not automatically disqualified from death penalty or abortion rights cases,²⁴⁶ nor are women judges from sex discrimination suits,²⁴⁷ black judges from race discrimination suits,²⁴⁸ Asian judges from cases involving prominent Asian-American parties,²⁴⁹ homosexual judges from sexual orientation discrimination cases,²⁵⁰ or Jewish judges from cases involving allegations of anti-Semitic or anti-Israel motive.²⁵¹ In fact, any suggestion that the judge should be per se ineligible to preside is often seen as offensive, impugning the judge's ability to put aside her own views in order to fairly apply the law—which is ultimately what judges must always do—and exploiting the judge's personal background for strategic purposes.²⁵²

246. See generally Richard B. Saphire, *Religion and Recusal*, 81 Marq. L. Rev. 351 (1998). For an analysis of the issue of Catholic judges presiding over death penalty cases, see John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303 (1998).

247. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

248. See *Paschall v. Mayone*, 454 F. Supp. 1289, 1301 (S.D.N.Y. 1978) (holding that a black judge's prior career as a civil rights advocate did not translate into impartiality). For an eloquent discussion of the perils of using race or other personal characteristics as the basis for disqualification, see Judge Higginbotham's opinion in *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 163-66, 180-81 (E.D. Pa. 1974). For further analysis of this case, see Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 Mich. L. Rev. 766, 775-78 (1997).

249. See *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998).

250. See generally Malarkey, *supra* note 73.

251. See *United States v. El-Gabrowny*, 844 F. Supp. 955, 961-62 (S.D.N.Y. 1994); see also *In re Disqualification of Fuerst*, 674 N.E.2d 361, 362 (Ohio 1996) ("Absent a specific demonstration of bias or prejudice or the existence of some other disqualifying interest, I decline to adopt a general rule that mandates the disqualification of a judge from a case involving a religious organization with which the judge is affiliated.").

252. See *MacDraw*, 138 F.3d at 37-38. The court in *MacDraw* stated that

[a] suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge's membership in a particular racial or ethnic group. Such an accusation is a charge that the judge is racially or ethnically biased and is violating the judge's oath of office.

....
We do not hesitate to hold that the suggestions regarding Judge Chin's

Another area of the law in which recusal is not automatically required involves cases in which the judge owns stock in the victim of a crime.²⁵³ The few courts to have addressed this issue have agreed that an interest in a crime victim is not an interest in a party or in the subject matter of the proceeding.²⁵⁴ Courts have instead analyzed the substantiality of the interest,²⁵⁵ and also applied the appearance of partiality test of subsection (a) to determine whether the judge had to recuse.²⁵⁶ For example, in *United States v. Rogers*,²⁵⁷ the district judge held a "limited financial interest" in the Bank of America, the victim of a mail fraud scheme assigned to the judge for sentencing.²⁵⁸ The Ninth Circuit applied the subsection (a) appearance of bias test, and held that a reasonable person would not have questioned the judge's impartiality.²⁵⁹ A similar discretionary analysis is employed in cases involving real estate where the judge owns adjacent property.²⁶⁰

Although financial interests are not quite the same as personal conflicts based on a judge's background or experience, all grounds for disqualification require the law to hypothesize about what might be going on in a judge's mind as a result of particular factors. If the law recognizes that a judge's sex, race, ethnicity, religion, and even certain interests of the pocketbook should not automatically disqualify her from a case, it can apply a similar approach to the interests of putative or absent class members. Moreover, unlike immutable characteristics such as sex and race, even an otherwise disqualifying financial interest can be eliminated, if the judge or her family member elects to do so. In most cases, divestment makes the need for recusal disappear. As

impartiality violated the Code of Professional Responsibility.

Id. (upholding district judge's imposition of sanctions for filing improper recusal motion); see also *El-Gabrowni*, 844 F. Supp. at 961-62.

253. See Andrew L. Wright, Comment, *Invested in the Outcome: When the Judge Owns Stock in the Victim of the Crime*, 1998 U. Chi. Legal. F. 481, 481-87 (discussing cases).

254. *Id.* at 481. But see *United States v. Pappert*, No. CRIM.-A.- 942001601, 1998 WL 596707, at *5 (D. Kan. July 29, 1998) (noting that if restitution is involved, the judge would be considered to have an interest in the "subject matter of the proceeding" if the defendant had not agreed to repay the funds before the trial started).

255. See 28 U.S.C. § 455(b) (2000) (including as a disqualifier "any other interest that could be substantially affected by the outcome of the proceeding").

256. Wright, *supra* note 253, at 483-87. Some of the cases discussed in the Comment were decided pre-1974, before subsection (a) had been adopted and when the "substantial interest" test rather than the per se rule applied. An interest of \$10,000 has been said to give rise to a subsection (a) problem, *id.* at 485, while holdings representing .0072% of a bank's 5,391,527 shares have been held to be too minimal to require recusal, *id.* at 484 n.20.

257. 119 F.3d 1377 (9th Cir. 1997).

258. *Id.* at 1383-84.

259. *Id.* at 1383.

260. See *Herrington v. County of Sonoma*, 834 F.2d 1488, 1501-02 (9th Cir. 1987); see also *supra* note 98 (discussing land claim cases).

proposed in the following section, 28 U.S.C. § 455 should be amended to broaden the availability of this remedy in financial interest cases.

C. Proposed Changes

This Note proposes a set of two amendments to 28 U.S.C. § 455. The first, a revised version of Congressman Kastenmeier's proposal, addresses the status of both absent and putative class members. The second eliminates the need for disqualification based on financial interests by allowing divestiture to cure the conflict in appropriate cases.

1. Addressing Class Membership

With minor modification, Congressman Kastenmeier's proposal delineating the status of absent class members²⁶¹ is worthy of reconsideration. This Note proposes the following language for the new provision:

For purposes of *subsections (b)(4) and (b)(5)*, an absent or putative class member in a class action shall not be considered to be a party or to have a financial interest in the subject matter in controversy, but shall be considered to be a person or entity with an interest that could be affected by the outcome of the proceeding; *a person with a financial interest in an absent or putative class member in a class action shall not be considered to have an interest in a party or in the subject matter in controversy, but shall be considered to have an interest that could be affected by the outcome of the proceeding.*²⁶²

Under this approach, a putative or absent class member's interest, as well as the interest of one owning shares in a putative or absent class member, would be classified as "any other interest." The interest would thus be evaluated in each case to determine whether or not the outcome of the proceeding could *substantially* affect it.²⁶³

A uniform rule regarding putative and absent class members makes sense because any other approach simply postpones the day of reckoning as to the judge's possible disqualification until the moment the class is certified.²⁶⁴ It also makes sense to apply the same rule whether the judge or family member has an interest in a company that is a putative or absent class member, or is also—by virtue of her stock ownership—herself a putative or absent class member. In either case,

261. See *supra* Part II.B.

262. The italicized portions of the proposed provision denote alterations or additions to Congressman Kastenmeier's 1985 proposal to amend 28 U.S.C. § 455. See *supra* text accompanying note 232.

263. See 28 U.S.C. § 455(b)(4), (5)(iii) (2000).

264. See *supra* note 196 and accompanying text.

because of the peculiarities in the nature of class actions,²⁶⁵ the interest is something less than an interest in, or of, a party. This provision makes it unnecessary to decide across the board whether a putative or absent class member is akin to a party; it makes clear that the two are not, by definition, equivalent in the context of disqualification decisions.²⁶⁶

The proposed provision does not distinguish between large and small holdings, but rather focuses on the more relevant issue of how much the judge or her family member stands to benefit or lose depending on how the case comes out.²⁶⁷ For example, in *In re Cement*, the judge's wife owned shares in seven of the 210,000 class members valued at a total of \$50,000, but she stood to gain or lose no more than thirty dollars from the suit.²⁶⁸ Still, the requisite appearance of partiality test of subsection (a) could occasionally turn on the size of the holding. If the judge were a majority shareholder in a putative or absent class member, she could not sit on the case even if her interest did not stand to be substantially affected by the outcome of the suit, as her doing so would create an appearance of bias.

Though the Justice Department, in critiquing Congressman Kastenmeier's proposal, feared that the litigants on the opposing side might feel that the judge would identify psychologically with the companies in which she or her family were invested,²⁶⁹ the law does not—and indeed should not—posture itself to accommodate such speculation about a judge's inability to be impartial.²⁷⁰ Of course, the situation would always need to be evaluated under subsection (a) to determine whether it might give rise to an appearance of bias.²⁷¹ But even that test is based on reasonable assumptions rather than offhand allegations.²⁷²

The Justice Department also objected to distinguishing between absent class members and named class representatives.²⁷³ However, while both share equally in the judgment, only the named class

265. See *supra* Parts II.A.1, 2.

266. See *supra* notes 205-08 and accompanying text; see also 1 Newberg & Conti, *supra* note 16, § 1.04 (noting that absent class members are parties for some purposes but not for others).

267. See Leitch, *supra* note 245, at 532 (discussing why the extent to which the outcome would affect the interest, rather than the size of the interest, should be the focus of the inquiry into the court's impartiality).

268. *In re Cement and Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1080, 1083 (D. Ariz. 1981).

269. *Id.*

270. See *supra* notes 76, 251-52 and accompanying text.

271. See *supra* notes 83-84 and accompanying text.

272. See *supra* notes 76, 89, 251-52 and accompanying text.

273. See Letter of Assistant Attorney General Spears, *Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, *supra* note 231, at app. II.

representatives play an active role in the litigation.²⁷⁴ An interest in a named representative arguably creates an appearance of partiality problem under subsection (a). The named representative acts as a traditional plaintiff or defendant party in a non-class action case.²⁷⁵ From a conceptual standpoint, allowing a judge to preside while possessing a financial interest, even an inconsequential one, in a class representative named in the lawsuit's caption seems as improper as permitting a judge to sit on a non-class action case in which she owns stock in a party, a position the statutory scheme has long since rejected.²⁷⁶

Finally, the Justice Department's concern about the application of the new provision to other parts of the statute using the word "party"—subsection (b)(1), which disqualifies a judge for "personal bias or prejudice concerning a party," and subsection (d)(4), which defines a financial interest to include a position as "director, adviser, or other active participant in the affairs of a party"²⁷⁷—is easily solved by limiting the provision's reach to the use of the term "party" in subsections (b)(4) and (b)(5).

2. A New Subsection (f)

This Note also proposes replacing the current subsection (f) with the following provision:

Notwithstanding the preceding provisions of this section, with the exception of subsection (a), if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned becomes aware of a financial interest that would otherwise be disqualifying, disqualification is not required if the justice, judge, magistrate judge, or family member, as the case may be, before any further rulings are made with respect to the case, divests herself or himself of the interest that provides the grounds for the disqualification.²⁷⁸

This proposed amendment makes several changes to the existing provision. First and most important, it permits voluntary divestment as a cure for conflicts based on financial interests, regardless of the stage of the litigation in which they are discovered. This change eliminates the "substantial judicial time" prerequisite. Because the divestiture of such holdings will remove any conflict of interest, the

274. See 1 Newberg & Conti, *supra* note 16, § 1.03 ("Absent class members occupy a special, nontraditional status in litigation.").

275. In fact, the defendant in a class action may even propose a settlement with the named class representative alone. *Id.* §§ 11.11, 11.13.

276. See *supra* notes 56-62 and accompanying text.

277. See *supra* notes 56-62 and accompanying text.

278. See *supra* text accompanying note 67 for the language of the current subsection (f).

“substantial judicial time” requirement is superfluous²⁷⁹ and prevents the viable remedy of divestiture from being applied more widely in financial interest cases.²⁸⁰ In addition, the vagueness of the phrase “substantial judicial time” has effectively watered down the significance of this criterion for subsection (f)’s application.²⁸¹ Permitting divestiture as a remedy is sound policy, especially in light of the proliferation of class action suits: It increases judicial and administrative efficiency and economy,²⁸² and undercuts the incentives of litigants seeking a ground to get rid of a judge they deem unfavorable to them by unearthing evidence of some small interest.²⁸³

Second, the amended provision makes the cure of divestment subject to the appearance of bias test of subsection (a). Under the current subsection (f), a judge divesting after substantial judicial time has been spent need not even examine whether the particular circumstances give rise to an appearance problem.²⁸⁴ However, as the court in *Union Carbide* noted, in some cases in which divesting of the interest results in unusually high fees, capital gains taxes, or other detriment, that course of action might itself cause the judge’s impartiality to “reasonably be questioned” by an objective observer with knowledge of the facts.²⁸⁵ This appearance problem could also arise where the case has such notoriety or prestige that the judge might have sold the stock despite substantial costs in order to remain on the case. These scenarios would be the exception rather than the rule, but the question merits consideration in all cases.²⁸⁶ Including the subsection (a) analysis is consistent with the statute’s primary underlying values.

Third, the amendment eliminates the condition that the interest not be one that “could be substantially affected by the outcome of the proceeding.” In most cases, divestment of a financial interest removes any basis for the judge to favor one party over the other. In the minority of cases in which the judge’s financial stake stands to be so substantially affected by the outcome—if, for example, she is a major shareholder in a closely-held company—presiding over the case even following sale of the shares would create an appearance of impropriety, and divestment would not be permitted as a cure. To divest of such an interest would mean forgoing a inordinately large benefit or avoiding a tremendous detriment, and would therefore

279. See *supra* notes 214, 230 and accompanying text.

280. See *supra* Part II.A.3.

281. See *supra* note 126 and accompanying text.

282. See *supra* notes 28-32, 177-81, 241-42 and accompanying text.

283. See *supra* notes 31-32, 43, 177-81 and accompanying text.

284. See *supra* note 125 and accompanying text.

285. See *supra* note 216 and accompanying text. Of course, the higher the costs of divestment, the less likely the judge or family is to elect that option.

286. See *supra* note 26 and accompanying text; *supra* Part I.C.1.

imperil the judge's ability to be impartial. Using the subsection (a) test better serves the interests of the justice system than the "substantial impact of the outcome" test because the former considers the appearance of fairness, a more inclusive rubric than actual fairness.²⁸⁷

Fourth, the revised subsection removes the qualification that the curable interest be a "financial interest *in a party*" held by the judge, her spouse, or minor child residing in the household, and instead makes the provision applicable to any "financial interest that would otherwise be disqualifying." This change broadens the provision to encompass situations in which the judge or her family member is herself a putative or absent class member, or has a financial interest in the subject matter of the proceeding or any other interest that could be substantially affected, rather than an interest in a party.

Finally, the revised subsection expands the language to cover interests held by any family member—not just the judge's spouse or minor child, but also adult child, third-degree relative, spouse's third-degree relative, or the spouse of one of these persons—whose putative or absent class membership based on a financial interest would otherwise disqualify the judge under subsections (b)(4) or (b)(5).

3. Addressing Possible Challenges

This section anticipates potential arguments that critics of this Note's proposals might raise. First, it addresses the reasoning of the *Union Carbide* dissent that permitting divestment of inconsequential interests contravenes the 1974 per se rule. Second, it discusses the belief that even divested interests may taint a judge's impartiality. Third, it examines the effect the amendments might have on the incidence of recusal motions. Finally, it looks at the potential interplay between the new provisions and the integrity of the judicial system.

Contrary to the contention of the dissenting judge in *Union Carbide*,²⁸⁸ a rule evaluating the circumstances of a judge or family member's divestment under the appearance of bias test of subsection (a) does not mark a return to the pre-1974 substantiality test.²⁸⁹ The critical difference is this: Whereas the early rule permitted a judge to sit on a case while in possession of a conflicting financial interest as long as the interest was not substantial, the proposed rule would allow only divestiture. The sole alternative would be recusal. The judge could never sit on a case where she had a financial interest in the subject matter of the proceeding or in a party without divesting.

287. See *supra* note 26.

288. See *supra* notes 217-18 and accompanying text.

289. See *supra* note 55 and accompanying text.

The current § 455, as amended in 1974, does allow a judge to preside without divesting in some circumstances where her interest is classified under the “any other interest” category. This Note proposes including a financial interest in or of a putative or absent class member in that category. Under the “any other interest” standard, a judge is required to recuse if, and only if, her interest could be substantially affected by the outcome, or an appearance of partiality would result from her continuing to preside.²⁹⁰

Another frequent refrain is that possession of a financial interest creates a bias in the judge’s mind that perhaps even divestment cannot cure.²⁹¹ This argument proves too much. The law of judicial disqualification carefully avoids assuming bias on the basis of mere psychoanalytical speculation.²⁹² A judge’s sex, race, ethnicity, religion, and personal background do not automatically render her unfit to hear cases implicating those factors;²⁹³ there is no reason to believe, absent other facts particular to the case, that a judge’s recent financial holdings create a greater chance for bias.²⁹⁴ Moreover, subsection (a) is a safety valve for considering those case-specific facts where the other provisions of the statute would not require recusal.²⁹⁵

One might further speculate that if litigants knew that a judge could simply divest of a conflicting financial interest to avoid disqualification, that might deter them from moving for the judge’s removal. If that is correct, it is not necessarily undesirable; it would save time and money both for the court and the opposing party. Attorneys, however, are unlikely to forsake en masse the disqualification motion as a litigation tactic, particularly when they discover a substantial financial interest. In these cases, divestment would be unlikely and might also run afoul of subsection (a), leaving recusal as the only alternative. As long as the judge is unaware of the conflict, despite diligent efforts to monitor her portfolio, no statutory violation and no possibility of bias exist. If the judge discovers the interest *sua sponte*, she must either recuse or divest, but she cannot keep silent.

Of course, in light of recently publicized findings,²⁹⁶ some might argue that courts are already taking liberties with the disqualification rules, and that they should not be granted any more freedom in this area. The first proposed amendment, however, by clarifying the status of absent and putative class members, will contribute to greater

290. See 28 U.S.C. § 455(b) (2000).

291. See Flamm, *supra* note 20, § 7.2.

292. See *supra* notes 76, 89 and accompanying text.

293. See *supra* Part III.B.

294. See *supra* note 251 and accompanying text.

295. See *supra* notes 83-84 and accompanying text.

296. See *supra* note 39.

consistency in the caselaw, not less.²⁹⁷ The second proposed amendment, by permitting divestiture, will give judges who might currently hide behind the knowledge requirement of subsection (c)²⁹⁸—avoiding per se disqualification by staying a step behind in the task of conflict-checking—a greater incentive to come clean about conflicting financial interests by removing the inevitability of their per se disqualification from high-stakes, high-profile cases.²⁹⁹ It is impossible for the system to “police” judges; only their own integrity can ensure that the recusal statute, whatever its provisions, are enforced.

D. Application of the Proposed Provisions

This section applies the proposed provisions for statutory amendment to the four scenarios raised in the Introduction to this Note. Such application demonstrates the consistent analysis obtained in each of these cases which, under the present statute, are fraught with uncertainties.

Judge A, who owns shares in W Corporation, a named party in a suit pending before her, may choose to divest of the shares as soon as she becomes aware of the conflict, provided the circumstances will not

297. See *supra* Part II.A.2. Further, the proposed characterization of class membership as “an interest that could be affected by the outcome of the proceeding” employs a sensible formula which is already part of subsection (b). Cf. text of the first suggested amendment, *supra* text accompanying note 262; 28 U.S.C. § 455(b)(4), (5)(iii) (2000).

298. See *supra* Part I.C.3.

299. The CRC and *Kansas City Star* findings, detailed *supra* in note 39, reported that many judges had adjudicated cases with financial conflicts which the judges claimed had escaped their notice. While this scenario paints a disturbing picture, it should also remind one that the judges’ burden of conflict-checking is onerous. The findings further raise the question of why the parties in those cases did not identify and challenge the conflicts. One explanation for this is the difficulty attorneys face obtaining judges’ financial disclosure forms. See Testimony of Douglas T. Kendall, CRC Executive Director, CRC Report, *supra* note 39. As Mr. Kendall testified, [u]nlike the other two branches of government, which allow review and duplication of financial disclosure forms on the same day they are requested, the judiciary’s Financial Disclosure Office notifies a judge in writing before granting access to a financial disclosure report. This advance notification seems contrary to the Ethics Reform Act of 1989, which . . . makes no allowance for such advance notification. Because most litigants would rather not risk upsetting a judge, advance notification creates a powerful deterrent to many potential reviewers. It also takes at least a week, and frequently over a month, for the Financial Disclosure Office to process requests for review of a financial disclosure form.

Id. According to the CRC, judges’ financial disclosure forms are often wanting in accuracy and completeness. *Id.* To remedy this state of affairs, the CRC has proposed eliminating advance notification of requests for disclosure forms, posting recusal lists in local courthouses, and having judges file two versions of their disclosure forms—one for the Financial Disclosure Office and one redacted version (omitting personal or sensitive information) for public review. *Id.*

give rise to an appearance of partiality. Judge *A* must cease activity on the case until she eliminates the conflicting interest. If she chooses not to divest, or if the interest belongs to her spouse or minor child who does not wish to sell it, Judge *A* must recuse herself. The above analysis would apply as well if *W* Corporation were a named class representative in a class action pending before Judge *A*, since class representatives would be treated as parties.

Judge *B*, who owns shares in *X* Corporation, a putative member of the plaintiff class in a class action pending before her, is disqualified only if her interest is one that could be substantially affected by the outcome of the proceeding. If so, she may avoid disqualification by divesting of the interest, as long as the circumstances of divestment do not give rise to an appearance of impartiality under subsection (a), and as long as she suspends involvement in the case until she has divested. If her interest in *X* Corporation is not one that could be substantially affected by the suit, Judge *B* is not per se disqualified; she must still analyze the facts under subsection (a). An inconsequential interest would not bar the judge from presiding. The same analysis would apply if Judge *B*'s spouse or minor child were the interest-holder.

Judge *C*, who owns shares in *Y* Corporation, an absent member of the certified plaintiff class in a class action pending before her, will employ exactly the same analysis as Judge *B* in the above example.

Judge *D*, who owns shares in *Z* Corporation which make her a putative member of a class action pending before her, will evaluate whether her interest could be substantially affected by the outcome of the suit. If it could, she has the option of divesting of the shares and opting out of, or waiving her membership in, the class to avoid disqualification, provided the circumstances of the divestment and waiver would not lead an objective observer knowing all the facts to question her impartiality. It is irrelevant whether *Z* Corporation is a named party or absent class member in the suit; Judge *D*'s divestiture will simultaneously cure the need for recusal on that basis. If Judge *D*'s interest does not stand to be substantially affected by the outcome of the proceeding, she is not per se disqualified, but must, however, analyze the situation under subsection (a). The judge's status as a putative or absent class member would likely give rise to an appearance of impartiality and would therefore mandate either divestment and waiver of class membership or recusal in most cases. If the interest in *Z* Corporation were held by Judge *D*'s spouse, third-degree relative, her spouse's third-degree relative, or the spouse of such a person, that person could elect to divest and opt out of the class under the same conditions, eliminating the need for the judge's recusal.

CONCLUSION

Class action lawsuits have become nearly ubiquitous in this country, and the dimensions of these suits have grown as well. This trend has made it especially important to amend § 455 to create a clearer, more realistic, and more reasonable framework for dealing with judges' financial interest conflicts. In light of the often watered-down nature of the interest of absent or putative class members in a class action suit, the recusal statute should not treat them as parties, but rather should assess their financial interest in the outcome of the suit on a case-by-case basis. The law should not attach undue emotional or psychological significance to a passive investor's small stock holding in a particular company. Instead, it should recognize the divestment of a stock interest as a viable alternative to automatic disqualification in most cases. Ultimately, the goal of § 455 must be to balance the competing goals of promoting fair and impartial decision-making while preventing judge-shopping and keeping a heavily burdened judicial system running efficiently and economically. The amendments proposed in this Note promise to advance that quest.